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DIVISION II

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STATE OF WASHINGTON

NO. 46671-G-II BY _____
DEPUTY

COURT OF APPEALS
OF THE
STATE OF WASHINGTON

DIVISION 2

STATE OF WASHINGTON

v.

GARY D. MEREDITH

BRIEF IN SUPPORT OF

PERSONAL RESTRAINT PETITION

GARY D. MEREDITH

DOC # 984777

STAFFORD CREEK CORRECTIONS CENTER

H4-B38

191 CONSTANTINE WAY

ABERDEEN, WA 98520

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A. STATUS OF PETITIONER

Petitioner Gary Daniel Meredith (hereinafter "Meredith", a pro se litigant, petitions for relief from confinement. Meredith is currently incarcerated at Stafford Creek Corrections Center in Aberdeen, Washington, serving a 198-month sentence.

B. FACTS

1. Procedural History

Meredith was charged and convicted by a jury of second degree rape of a child and communication of a minor for immoral purposes in Pierce County Superior Court (Case No. 95-1-04949-6). The date of crime for both offenses was 10/29/94. Meredith was convicted on 5/10/96. He was sentenced on 11/21/08.

C. GROUNDS FOR RELIEF

FIRST GROUND : MEREDITH WAS DENIED HIS
SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE

OF COUNSEL.

To demonstrate ineffective assistance of counsel, a defendant must satisfy the two-prong test laid out in Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). First, a defendant must demonstrate that his attorney's representation fell below an objective standard of reasonableness. Second, a defendant must show that he was prejudiced by the deficient representation. Prejudice exists if there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. U.S. Const. Amend. 6; State v. McFarland, 127 Wash. 2d 322, 335, 899 P. 2d 1251 (1995).

1. Trial counsel was ineffective for failing to object to improper number of peremptory challenges afforded to Meredith, violating his right to secure a fair trial by an impartial jury.

Meredith's trial counsel's performance was deficient for failing to object to the improper number of peremptory challenges that were afforded to the defense, violating Meredith's Sixth Amendment right to effective assistance of counsel. U.S. Const. Amend. 6.

Meredith's constitutional right to a fair trial was violated as he was denied the proper number of peremptory challenges by the trial court. U.S. Const. Amend. 6; Wash. Const. Art. 1, sec. 22 ; CrR 6.4(2)(e)(i) ; CrR 6.5.

The right to trial by an impartial jury is guaranteed by the Sixth Amendment to the U.S. Constitution and article 1, section 22 of the Washington Constitution. State v. Brett, 126 Wn. 2d 136, 157, 892 P.2d 29 (1995) ; see Irvin v. Dowd, 366 U.S. 717, 722, 81 S.Ct. 1639, 6 L.Ed. 2d 751 (1961). The language of article 1, section 22 of our state constitution is similar to that of the Sixth Amendment and has been construed to ensure and protect one's right to a fair and impartial jury. State v. Davis, 141 Wn. 2d 798, 855, 10 P. 3d 977 (2000).

Denial of the right to an impartial trier of fact is a classic structural error, requiring reversal without a showing of prejudice. State v. Bernard, 327 P. 3d 1290, 1299 (Div. 2 2014).

Constitutional errors affecting framework within which trial proceeds, rather than simply an error in trial process itself, infect entire trial process and necessarily render trial fundamentally unfair, so as to preclude

harmless-error review. Neder v. U.S., 527 U.S. 1, 119 S.Ct. 1827 (U.S. Fla. 1999).

Trial court erroneously afforded Meredith only seven peremptory challenges when he was entitled to eight, pursuant to CrR Rules 6.4(2)(e)(1) and 6.5.

CrR 6.4(2)(e) - PEREMPTORY CHALLENGES reads in pertinent part :

(1) Peremptory Challenges Defined. A peremptory challenge is an objection to a juror for which there is no reason given, but upon which the court shall exclude the juror. In prosecution for offenses punishable by imprisonment in the State Dept. of Corrections the defense and the state may challenge peremptorily 6 jurors each.

CrR 6.5 - ALTERNATE JURORS reads in pertinent parts:

When the jury is selected the court may direct the selection of one or more additional jurors, in its discretion, to be known as alternate jurors. Each party shall be entitled to one peremptory challenge for each alternate juror to be selected.

In Meredith's trial, there were a total of 14 jurors impaneled to sit on the jury, including the two alternates. RP 5, 9-10 ; also Exhibit A.

The defense and the State were each afforded seven peremptory challenges, for a total of 14 altogether.^{FN 1.} This conclusion can easily be derived from Report of Proceedings, page 5, where a colloquy with all parties ensues regarding how many potential jurors to call to the venire, as well as how many alternates to seat. After the court established there would be 14 total jurors seated, including two alternates, the prosecutor suggests 40 jurors be called up, "28 ... for purposes of challenges [14 jurors + 14 peremptory challenges], and the extra jurors in case there are excuses for cause." RP 5.

The court then confirmed the calculations: "I was doing the math, as the State has already done, that leaves us 12 [for cause] out of the 40." *Id.* (The court decided to call up 45 jurors).

FN 1. The parties exercised their peremptory challenges in a sidebar held outside the hearing of the reporter. Voir dire, p. 240. Hence, there is no verbatim transcription of the peremptory challenges.

According to these calculations, 14 total peremptory challenges were afforded. Since each side is afforded the same amount, each side was afforded seven.

Meredith exhausted all seven of his peremptory challenges, likewise, the State exhausted all seven of theirs, evinced by the 14 total jurors that were peremptorily excused. See Exhibits A and B.

By rule, Meredith was entitled to 8 peremptory challenges; the trial court erroneously afforded him 7.

Any right of defendant to peremptory challenges in state court is denied or impaired only if defendant does not receive that which state law provides. Ross v. Oklahoma, 487 U.S. 81, 108 S.Ct. 2273 (U.S. Okla 1988).

[P]rejudice occurs in the deprivation of one peremptory challenge to which a defendant is entitled. State v. Stentz, 30 Wash. 134, 147, 70 P. 241 (1902).

"Any impairment of a party's right to exercise a peremptory challenge constitutes reversible error without a showing of prejudice. As such, harmless error analysis does not apply." State v. Bird, 136 Wn. App. 127, 134, 148 P. 3d 1058 (Div. 2 2006) (quoting State v. Evans, 100 Wash App. 757, 774, 998 P. 2d 373 (2000)).

The United States Supreme Court has stated, in cases dating back more than a hundred years, that the denial or impairment of the right to exercise peremptory challenges is reversible error without the showing of prejudice. Ross v. Oklahoma, *supra* (citing Swain v. Alabama, 380 U.S. 202, 219, 85 S. Ct. 824, 835, 13 L. Ed. 2d 759 (1965)) (citing Lewis v. United States, 146 U.S. 370, 376, 13 S. Ct. 136, 138, 36 L. Ed. 1011 (1892); Harrison v. United States, 163 U.S. 140, 16 S. Ct. 961, 41 L. Ed. 104 (1896)).

Many defendants have successfully claimed prejudicial error when they were compelled to exercise their final peremptory challenge on a potential juror to cure an erroneous for-cause refusal, thus depriving them of a peremptory challenge. See State v. Parnell, 77 Wn. 2d 503, 463 P. 2d 134 (1969); McMahon v. Carlisle-Pennell Lumber Co., 135 Wash. 27, 236 P. 797 (1925); State v. Stentz, 30 Wash. 134, 70 P. 241 (1902); State v. Ruten, 13 Wash. 203, 43 P. 30 (1895).

These courts held that the deprivation of a peremptory challenge prejudices a defendant's right to secure a fair trial guaranteed by the U.S. and state constitutions, as long as a defendant exhausts all his peremptories.

Meredith was deprived of one of his peremptory challenges and did exhaust all peremptories he was afforded, but, other than that, Meredith is distinguishable.

All of these defendants' deprivation or loss of a peremptory challenge was the result of their choice to use their final peremptory on a juror that the court refused to excuse for cause. Whereas Meredith was deprived of his final peremptory challenge to which he was entitled due to trial court error, and his counsel's failure to object.

Had Meredith not exhausted all seven peremptory challenges that he was afforded, perhaps his argument fails because then an argument could possibly be made that he knowingly opted not to use a peremptory challenge for whatever reason he may have desired. But here, in these circumstances, due to trial court error, Meredith was devoid of any choice in using his eighth, or final, peremptory challenge in any way he may have effectively desired, such as on a biased juror the trial court refused to excuse for cause. An issue that is later argued in this petition. The choice literally didn't exist.

A "hard choice is not the same as no choice", the U.S. Supreme Court reasoned in U.S. v. Martinez-Salazar, 528 U.S. 304, 315-16, 120 S.Ct. 774, 145 L.Ed. 2d 792 (2000), concluding that Martinez-Salazar was not deprived of a peremptory challenge when he used his final peremptory to cure an erroneous for-cause refusal, but rather used it "in line with a principle reason for peremptories : to help secure

the constitutional guarantee of a trial by an impartial jury."

Meredith contends that the phrase "hard choice is not the same as no choice" implies that having "no choice" to exercise one's peremptory challenge is prejudicial to one's right to help secure the constitutional guarantee of trial by an impartial jury. Whereas a "hard choice" is still a choice to use one's peremptories however one feels would be most effective, including to cure a trial court's error in not excusing a juror for cause.

An essential element of a fair trial is an impartial trier of fact. And peremptory challenges play an integral role in the voir dire process. Thus, voir dire is a significant aspect of the trial because it allows parties to secure their article 1, section 22 right to a fair and impartial jury through juror questioning. State v. Momah, 167 Wn.2d 140, 152, 217 P.3d 321 (2009).

By statute and by court rule, Meredith generally had the right to exercise all of his entitled peremptory challenges against potential jurors without giving a reason, including whether or not the reason for the challenge was revealed by voir dire. State v. Evans, 100 Wash. App. at 763; RCW 4.44.140; CrR 6.4(2)(e)(1). Only then could Meredith be assured of the constitutional right to a fair trial by an impartial jury.

Since no reason need be given, this court should not

require Meredith to affirmatively show by the record that there were reasons for excusing any particular juror who sat on the panel, see McMahon v. Carlisle - Pennell Lumber Co., 135 Wash. at 31 (1925), as that would be in conflict with the broader purpose of peremptory challenges, which is to allow a party to exclude a potential juror "for which no reason need be given." RCW 4.44.140.

"Any system for the impaneling of a jury that prevents or embarrasses the full, unrestricted exercise by the accused of that right [to use one's peremptory challenges], must be condemned." Pointer v. United States, 151 U.S. 396, 408, 14 S. Ct. 410, 414, 38 L. Ed. 208 (1894).

It is reversible error to deny a party to a jury trial the peremptory challenges to which the rules of procedure entitle him, although it will rarely, if ever, be possible to show that the trial would have come out differently with a different jury. Olympia Hotels Corp. v. Johnson Wax Development Corp., 908 F.2d 1363 (C.A.7 (Wis.) (1990)).

Equal Protection Violation.

Considering the fact that all defendants in the State of Washington on trial for offenses punishable by imprisonment in the State Dept. of Corrections are entitled to 6 peremptory challenges pursuant to CrR 6.4(2)(e)(i), plus one per-

emptory challenge for each alternate juror pursuant to CrR 6.5, a defendant whose trial has 2 alternate jurors, such as the case in Meredith's trial, should be afforded a total of 8 peremptory challenges.

Meredith's equal protection rights were violated as he was afforded only 7 total peremptory challenges. This, of course, begs the question: Why should Meredith be afforded only 7 peremptory challenges putting him at a distinct disadvantage when selecting a fair and impartial jury than a defendant in an identical situation that is afforded 8 peremptory challenges?

Equal protection requires that persons similarly situated with respect to the legitimate purpose of the law must receive like treatment. U.S. Const. Amend. 14 ; Wash Const. art. 1, sec. 12.

Although the Supreme Court in U.S. v. Martinez-Salazar, 528 U.S. at 311 (2000) said "[p]eremptory challenges are auxiliary" and "are not of federal constitutional dimension," Meredith argues that the deprivation of one of his peremptory challenges by the trial court, of which he was never afforded but was entitled to by law, violated the equal protection clauses of the 14th Amendment to the U.S. Constitution and article 1, section 12 of the Washington Constitution.

Due Process Violation.

Although "[t]here is nothing in the Constitution of the United States which requires Congress to grant peremptory challenges", Meredith claims his due process rights were violated when the trial court deprived him of his final peremptory challenge to which he was by law entitled, precluding Meredith the ability to help himself achieve a fair trial and ensure a panel with impartial jurors. U.S. Const. Amend. 14, sec. 1; Wash. Const. art. 1, sec. 3; quoting Stilson v. United States, 250 U.S. 583, 586, 40 S. Ct. 28, 63 L. Ed. 1154 (1919).

"The failure to accord an accused a fair hearing violates even the minimal standards of due process. In re Oliver, 333 U.S. 257; Tumey v. Ohio, 273 U.S. 510. 'A fair trial in a fair tribunal is a basic requirement of due process.' In re Murchison, 349 U.S. 133, 136." State v. Parnell, 77 Wn. 2d 503, 507, 463 P.2d 134 (1969) (quoting Irvin v. Dowd, 366 U.S. at 722).

Criminal defendant is entitled to a fair trial from the State, including due process. U.S. Const. Amend. 14, sec. 1; Wash. Const. art. 1, sec. 3.

Not only should there be a fair trial, but there should be no lingering doubt about it. State v. Parnell, *supra* at 508.

Where a state statute creates a liberty interest, procedural due process protects that interest. State v.

Henthorn, 85 Wash. App. 235, 932 P.2d 662 (Div. 1 1997)
(citing Vitek v. Jones, 445 U.S. 480, 100 S.Ct. 1254, 63 L.
Ed. 2d 552 (1980))).

Regarding any potential argument that Meredith waived his right to assert his argument to the erroneous number of peremptory challenges by the failure of his trial attorney to register an objection at the appropriate time, the invasion of Meredith's constitutional right to a fair trial secures review of this issue. State v. Vining, 2 Wash. App. 802, 472 P.2d 564 (1970).

If this court is not satisfied that the records and transcript of which Meredith has referred to is sufficient to ascertain the number of peremptory challenges the State and the defense were each afforded, and how many each side exercised, then Meredith requests an evidentiary hearing pursuant to RAP 16.11(b) to determine whether such a document pertaining to those details exists.

In conclusion, Meredith was erroneously deprived by the trial court of his eighth, or final, peremptory challenge of which he was entitled to by law. Meredith's trial counsel was ineffective for failing to object to the trial court erroneously affording Meredith an improper number of peremptory challenges. This deprivation impaired Meredith's right to the legal, unrestricted use of his final peremptory challenge prejudicing his ability to secure the constitutional

guarantee of a fair trial by an impartial jury. Consequently, Meredith's right to due process under the law was violated.

Also, the trial court violated Meredith's right to equal protection of the law as the court erroneously afforded him an improper number, and lesser number of peremptory challenges than any other defendant in Meredith's exact circumstances would be entitled to under Washington State law.

Even though the deprivation, denial, or impairment of one's right to exercise a peremptory challenge cannot be harmless and requires automatic reversal without the showing of prejudice, Meredith believes he has met the actual and substantial prejudice standard required in a personal restraint petition if it is to be deemed necessary that he meet that standard.

Ineffective Assistance of Appellate Counsel

Meredith argues that had his appellate counsel, James E. Lobsenz, argued in Meredith's direct appeal that it was error for the trial court to afford Meredith a lesser number of peremptory challenges to which he was entitled, as well as his trial counsel's failure to object to that, Meredith would have met the prejudicial

standard required on direct appeal, if deemed necessary, and reversal of his convictions would have been required.

Meredith respectfully requests this court to find that his constitutional rights were violated and reverse and remand his convictions, or refer this case for an evidentiary hearing if this court deems it necessary.

2. Trial counsel was ineffective for failing to exercise peremptory challenge on biased juror, violating Meredith's right to a fair trial by an impartial jury.

During voir dire examination of the forty-five prospective jurors, 12 of them were removed after having been challenged for cause, several after expressing difficulties of being fair and impartial due to the nature of the charges.

Toward the conclusion of voir dire proceedings, the venire was informed that Meredith had previously been convicted of two felony sex offenses and was asked if there was anybody on the venire that could not be fair and impartial because of the prior conviction evidence that was to be admitted during trial. Voir dire, p. 232-240.

Two of the prospective jurors answered individually

that they would have difficulty being fair and impartial and were removed for cause. Juror No. 32 expressed serious doubts about his ability to be fair and impartial, and Meredith challenged the juror for cause. The prosecutor then asked the juror a series of questions in attempt to rehabilitate the juror, followed by Meredith's final inquiry of the juror and renewal of his for-cause challenge. The trial court tersely denied Meredith's challenge. Voir dire, pp. 236-39.

Immediately afterwards, voir dire examination of the prospective jurors concluded, and peremptory challenges were exercised shortly thereafter.

The following jurors were impaneled on this case: Jurors No. 1, 8, 11, 13, 14, 15, 16, 17, 20, 23, 24, 32, 35, and 39. Voir dire, p. 241.

Meredith contends he is entitled to relief because subsequent to the trial court's denial of Meredith's for-cause challenge of Juror No. 32, his trial counsel, Brett Purtzer, failed to peremptorily remove the biased juror, thus, allowing the juror to be impaneled, which, in turn, violated Meredith's Sixth Amendment right to effective assistance of counsel and a fair trial by an impartial jury.

Right to a trial by jury includes the right to an unbiased and unprejudiced jury, and a trial by a jury, one or more of whose members is biased or prejudiced, is not a constitutional trial. State v. Parnell, 77 Wn. 2d 503 (1969).

Denial of the right to an impartial trier of fact is a classic structural error, requiring reversal without a showing of prejudice. State v. Bernard, 327 P. 3d at 1299 (2014).

The underlying goal of the jury selection process is "to discover bias in prospective jurors" and "to remove prospective jurors who will not be able to follow instructions on the law," and thus, to ensure an impartial jury, a fair trial, and the appearance of fairness. State v. Davis, 141 Wn.2d 798, 824-26, 10 P.3d 977 (2000).

Voir dire examination has purposes to ascertain whether there is basis for challenge for cause, and to ascertain whether it was wise and expedient to exercise peremptory challenge. State v. Simmons, 59 Wa.2d 381, 368 P.2d 378 (1962).

During voir dire examination, in front of entire venire including jurors eventually impaneled, Juror No. 32 expressed very strong sentiment about the fact that Meredith has prior convictions for similar-type offenses and the impact that that would have on his ability to be impartial. In his initial response he states:

"I didn't know up until now that there were priors[.] I was pretty sure I could be impartial. I don't know now. I kind of doubt it." Voir dire, p. 236.

The phrase "pretty sure" clearly indicates Juror No. 32 already harbored some degree of a preconceived

mindset as to whether he could be impartial, perhaps, due to the nature of the charges.

In response to defense's question of whether "the prior convictions will overshadow everything else you hear in the testimony," Juror No. 32 expressed conviction in his personal belief and opinion, stating:

"I just feel that I wouldn't be able to be impartial. As far as giving a good verdict." Voir dire, p. 236.

Juror No. 32 clearly confirmed his conviction of his personal beliefs when, next, he responded in the affirmative that if he were sitting where Mr. Meredith was he wouldn't want himself as a juror on this case because he doesn't think he could be fair and impartial. Voir dire, pp. 236-37.

"The theory of the law is that a juror who has formed an opinion cannot be impartial." Reynolds v. United States, 98 U.S. 145, 155. "State v. Parnell, 77 Wn. 2d at 507 (quoting Irvin v. Dowd, 366 U.S. at 722 (1961)).

Meredith asserts that the responses Juror No. 32 gave clearly exhibited actual bias towards Meredith's guilt.

One primary purpose of the voir dire process is to determine whether prospective jurors harbor "actual bias" and are thus unqualified to serve in the case. See, e.g., State v. Tharp, 42 Wn.2d 494, 499, 256 P.2d 482 (1953).

Actual bias is any bias in the mind of the juror, for

or against either party, which would render it difficult or impossible for the juror to be a fair and impartial juror in the case. RCW 4.44.170(2).

To be free from actual bias, a juror must be able to set aside personal beliefs, opinions, or values insofar as necessary to follow the law and decide the case fairly, see, e.g., Irvin v. Dowd, 366 U.S. at 722 ; State v. Moody, 18 Wash. 165, 169-70, 51 P. 356 (1897).

A juror who has an opinion as to the guilt or innocence of defendant so far fixed that evidence would be required to remove it, is disqualified, although he may further state that he can, or believes he can, disregard such opinion, and try the case according to the law and evidence adduced upon the trial. State v. Riley, 36 Wash. 441, 78 P. 1001 (1904).

Meredith believes that the prosecutor's attempts to rehabilitate Juror No. 32 were insufficient. When asked by the prosecutor if he will "commit to following the Court's instructions on the law, including whatever instructions are given as to how you consider those two prior convictions?",

Juror No. 32 responded:

"I do have a doubt now. Pretty hard for me to follow the Court's instructions."

When asked next if he would strive to do so, he answered, "I would strive to, yes." Voir dire, p. 237.

Meredith believes it's worth noting that Juror No. 32's preconceived notion of actual bias stemming from Meredith's prior convictions was so overwhelming that he could only "strive" to follow the court's instructions.

The Merriam-Webster Dictionary defines "strive" as "to make effort." Meredith asserts that any juror empaneled to decide a case would hopefully "make an effort" or "strive" to follow the Court's instructions. As a defendant on trial accused of serious charges, Meredith has a right to be tried by fair and impartial jurors that will commit to following the Court's instructions, not just "make an effort" or "strive" to.

When asked by the prosecutor if he could judge this case solely on evidence "from the witness stand and the exhibits you get in court", Juror No. 32 implied it would take evidence to remove the bias embedded from the prior convictions before he could impartially judge the case on other evidence and exhibits to be admitted during trial:

"That's something that I would have to think about, go through all the evidence, which way to go. But one thing that I don't like about it is why do we have to have all of this stuff, there is no reason for it."
Voir dire, pp. 237-38.

Meredith alleges that Juror No. 32 seemed perturbed, believing that something was wrong with the trial process

as to why the prior conviction evidence was even necessary because it would make it improbable for him to accord Meredith the presumption of innocence.

Where juror admits that he has opinion as to guilt of accused, which would take evidence to remove, that he believes there was something wrong and he could not accord accused the presumption that he was innocent, until proven guilty, he should be excused on challenge for cause. State v. Ruten, 13 Wash. 203, 43 P. 30 (1895).

The prosecutor's final attempt at rehabilitating Juror No. 32 came in the form of a leading question: "[I]t bothers you, it sticks in the back of your mind, but nevertheless you would follow the Court's instructions, listen to the testimony, judge this case solely on the evidence?"

Juror No. 32 responded with a one-word affirmation: "Yes." Voir dire, p. 238.

Leading questions by the court and by the attorney for the State, which plainly indicate to jurors what answer is expected of them, will not outweigh the deliberate statement they made of their own free will, uninfluenced by leading questions, that they had opinions in regard to the guilt or innocence of the accused which it would take evidence to remove. State v. Ruten, 13 Wash. at 207-08.

Just as most potential jurors will not respond affirmatively if asked, "Are you biased?" few will fail to respond

affirmatively to a leading question asking whether they can be fair and follow instructions. State v. Fire, 100 Wn. App. 722, 728, 948 P.2d 362 (Div. I 2000) (trial court erred by refusing to excuse for cause a potential juror whose initial responses indicated actual bias, focusing instead on the juror's one-word affirmations to the prosecutor's leading questions about being fair and following instructions).

The circumstances here are like those in Fire in that Juror No. 32's initial responses, and throughout examination, indicated actual bias and that he wouldn't be able to be fair and impartial. As well, his responses to the prosecutor's questions were either a one-word affirmation to a leading question or they only indicated it would be difficult for him to follow the court's instructions and that he would need all the evidence to possibly become impartial, basically lacking any rehabilitative attributes.

As Meredith's voir dire examination of potential jurors drew near conclusion, Juror No. 32 reiterated that it would take evidence from throughout the trial to possibly offset the preconceived notion of guilt he continued to harbor as he was already leaning towards that direction. When asked by the defense if the evidence of prior felony convictions for sexual offenses would "have more weight than other evidence you might hear,"

and would he find himself "judging solely because of the prior convictions?" Voir dire, p. 239. Juror No. 32 responded:

"[That] would have a lot to do with it. It's quite possible that after the evidence came in, maybe it could be changed to where I could come and be impartial." Id.

Defense counsel lastly asks: "As we sit here right now, hearing that type of evidence, you are already leaning towards one decision?"

Juror No. 32 responded: "Yes." Id.

Meredith then renewed his challenge for cause. The trial court laconically denied Meredith's challenge without explanation, stating: "I am not going to excuse Juror No. 32." Id.

Meredith argues that the trial court erred in failing to offer any sort of assessment of Juror No. 32's state of mind, nor did it elaborate at all on its reasoning for denying Meredith's for-cause challenge. When a challenge for actual bias is made, the trial court must assess the prospective juror's state of mind. State v. Jackson, 75 Wn. App. 537, 542-43, 879 P.2d 307 (Div. I 1994).

The purpose of voir dire examination of prospective jurors in criminal case is to enable parties to learn such jurors' state of mind, so as to know whether any of them may be subject to challenge for cause and determine

advisability of interposing peremptory challenges. State v. Tharp, 42 Wn.2d 494, 256 P.2d 482 (1953).

Meredith maintains that Juror No. 32's state of mind was that of obvious and distinct prejudice as he continued to veraciously express actual bias towards Meredith due to his prior convictions. Nothing in Juror No. 32's responses indicated he had come to understand that he must lay his preconceived notions aside or implied he could commit to following the court's instructions. In fact, it is entirely possible that the juror may have believed it was possible to retain his preconceived notions and still follow the instructions of the court. Juror No. 32 was not sufficiently rehabilitated.

In light of the trial court's denial of Meredith's for-cause challenge to remove Juror No. 32, Meredith argues that his trial counsel's performance was deficient and ineffective for failing to use a peremptory challenge to remove the biased juror, who then was eventually impaneled.

Courts have consistently recognized peremptory challenges as integral to "assuring the selection of a qualified and unblased jury." Batson v. Kentucky, 476 U.S. 79, 91, 106 S. Ct. 1712, 90 L.Ed. 2d 69 (1986).

The court in United States v. Martinez-Salazar, 528 U.S. at 316-17, reasoned that use of a peremptory to excuse a juror who should have been excused for cause

is in line with a principle reason for peremptory challenges -- the selection of an impartial jury.

Litigants are afforded a limited number of peremptory challenges. See CrR rules 6.4(2)(e)(i) and 6.5 ; RCW 4.44.130, .140. The use of peremptory challenges is intended to supplement our overarching framework of excluding unqualified jurors for cause. State v. Saintcalle, 178 Wn.2d 34, 79, 309 P.3d 326 (2013).

Taking this intended use of peremptory challenges into account, plus the fact that the number of afforded peremptories is limited, Meredith contends it is crucial that counsel use those peremptory challenges as wisely and beneficially as possible. This contention, Meredith believes, amplifies the significance of his counsel's (Mr. Purtzer's) negligence in not using one of Meredith's peremptory challenges to remove Juror No. 32, who candidly expressed he could not be impartial because of Meredith's prior convictions.

A criminal defendant can rebut the presumption of reasonable performance by demonstrating that "there is no conceivable legitimate tactic explaining counsel's performance." State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004) ; State v. Aho, 137 Wn. 2d 736, 745-46, 975 P.2d 512 (1999).

Trial counsel's failure to move to strike venireperson who asserted that he did not believe he could be fair

to defendant and who was not rehabilitated was not reasonable trial strategy, and therefore was ineffective assistance of counsel. U.S. Const. Amend. 6; White v. State, 290 S.W. 3d 162 (Mo. Ct. App. E.D. 2009); Hughes v. U.S., 258 F. 3d 453 (C.A. (Mich.) 2001) (court held that (1) counsel's failure to strike a juror who stated on voir dire that she did not think that she could be fair constituted ineffective assistance, and (2) given juror's express admission of bias, with no rehabilitation by counsel or the court, actual bias of the juror was established, requiring a new trial).

Meredith maintains that is inconceivable that Mr. Purtzer did not use one of his peremptory challenges to remove Juror No. 32 who clearly expressed actual bias and stated he was already leaning towards one decision, "because no defense attorney under such circumstances would dare to leave the person making such an answer on the jury[.]" quoting State v. Parnell, 77 Wn. 2d 503, 505 (1969).

Meredith contends Mr. Purtzer's failure to use a peremptory challenge on Juror No. 32 cannot be considered legitimate or reasonable trial strategy evinced by the fact that only moments prior to the exercising of peremptory challenges, Mr. Purtzer, in challenging Juror No. 32 for cause, clearly demonstrated his intentions of removing the biased juror. Likewise, should it hypothetically be con-

cluded that counsel inadvertantly overlooked or forgot to peremptorily strike Juror No. 32, that, Meredith argues, would amount to deficient performance and ineffective assistance as well.

Mr. Purtzer should have apprised Meredith of his intentions regarding the use of his peremptory challenges so as to allow for Meredith's consent or disapproval of Purtzer's intentions. Counsel cannot waive a criminal defendant's basic Sixth Amendment right to trial by jury without the fully informed and publicly acknowledged consent of the client, and likewise cannot so waive a criminal defendant's basic Sixth Amendment right to trial by an impartial jury. U.S. Const. Amend. 6 ; Hughes v. U.S., 258 F. 3d 453.

Meredith maintains it would have been impossible for him to have given Mr. Purtzer consent or express any level of desire to use or not use a peremptory challenge on Juror No. 32 as Meredith was never fully informed or even made aware of Purtzer's intended use of his peremptory challenges. Mr. Purtzer, just minutes prior, had unsuccessfully challenged Juror No. 32 for cause, so it would have been very reasonable for Meredith to have assumed, if cognizant of the process, that Purtzer would undoubtedly use a peremptory challenge on Juror No. 32, which would have precluded any chance of the biased juror

being impaneled. Mr. Purtzer's decision not to use a peremptory challenge on Juror No. 32 was "so ill-chosen that it permeated the entire panel with obvious unfairness." quoting Hughes v. U.S., 258 F.3d 453.

The "impartial jury" aspect of Art. 1, sec. 22, of the Washington Constitution focuses on the defendant's right to have unbiased jurors, whose... prejudice does not taint the entire venire and render the defendant's trial unfair. State v. Momah, 167 Wn.2d at 152.

Evidence of other misconduct by its very nature is highly prejudicial because of its inherent implication that "once a criminal, always a criminal." See State v. Burton, 101 Wn.2d 1, 9, 676 P.2d 975, 981 (1984). A jury may feel that a man once convicted of a particular crime might be prone to commit a similar offense. See State v. Anderson, 31 Wn. App. 352, 356, 641 P.2d 728, 730-31 (1982). Evidence of other sexual offenses is particularly prejudicial "in sex cases, where prejudice has reached its loftiest peak." State v. Saltarelli, 98 Wash. 2d 358, 363-64,

Once stereotypes have formed, they affect us even when we are aware of them and reject them. Stereotypes can greatly influence the way we perceive, store, use, and remember information. Discrimination, understood as biased decision-making, then flows from the resulting distorted

or unobjective information. State v. Saintcalle, 178 Wn. 2d at 48. There are minds, doubtless, that are capable of laying aside preconceived ideas and opinions, and of arriving at conclusions from particular facts, disregarding and not considering others. But this is an attribute of mind that is acquired by special training and education, and is not an acquirement possessed by the ordinary jurymen. State v. Riley, 36 Wash. 441, 448 (appellant did not have a fair trial before a fair and impartial jury).

[I]t is unlikely that a prejudiced juror would recognize his [or her] own personal prejudice — or knowing it, would admit it. See WAYNE R. LAFAYE ET AL., CRIMINAL PROCEDURE, sec. 22.3(c), at 308 (2d ed. 1999); State v. Fire, 100 Wn. App. at 728.

Meredith alleges that most people are followers, only a few are leaders. Most leaders are outspoken, their words having more impact and effect on the psyche of a panel of people, in this case, jurors, than those that may not yet have formed an opinion. This, Meredith believes, could not be exemplified in any truer fashion than in the statement given in front of the entire venire by the eventually impaneled Juror No. 11 during voir dire :

"and one thing is to be real open to the other members of the jury as to what their opinions are, how they see it, because you know you

can see it one way, but they can bring up things that kind of enlighten the situation about what you are thinking about." *Voir dire*, p. 143.

"Verily, a polluted stream is an opinionated man. One must be a sea to be able to receive a polluted stream without becoming unclean." Friedrich Nietzsche, *Thus Spoke Zarathustra* (1954).

It's Meredith's contention that officers of the court, the trial judge and attorneys for the State and defense, are innately viewed as being held to high standards and their actions expected to be credible and fair. So when Juror No. 32 promulgated a strong notion of actual bias in combination with the trial judge's succinct ruling to not excuse that juror for cause, plus Mr. Partzer's failure to then peremptorily remove that juror, who subsequently was impaneled, it implied affirmation of such biased notions and had a profound impact on the psyche of the jurors as a whole, thus, tainting the entire panel who may not have been as honest and forthcoming as Juror No. 32.

"In a community where most veniremen will admit to a disqualifying prejudice, the reliability of the others' protestations may be drawn into question; for it is then more probable that they are part of a community

deeply hostile to the accused, and more likely that they may have unwittingly been influenced by it."

Murphy v. Florida, 421 U.S. 794, 802-803, 95 S.Ct. 2031 (1975).

Having witnessed Juror No. 32 not being disqualified by the trial judge after expressing such strong bias with regards to a defendant with a history of prior sex convictions, Meredith contends it is entirely plausible that the jury panel may have believed it was possible, or even acceptable, to retain their own preconceived notions and still follow the instructions of the court. The overall prejudicial effect this had on the jury undoubtedly affected the verdict as, Meredith strongly believes, no amount of curative instructions could have remedied any unwitting influences embedded within the jury from the indirect affirmation of such prejudicial mindset.

"When evidence [of prior crimes]... reaches the jury, it is most difficult, if not impossible, to assume continued integrity of the presumption of innocence. A drop of ink cannot be removed from a glass of milk." Government of Virgin Islands v. Toto, 529 F. 2d 278, 283 (3d Cir. 1976).

The presumption of innocence is a basic component of a fair trial. U.S. Const. Amends. 6, 14 ; Wash. Const.

art. 1, sec. 3, 22 as amended by 10.

Meredith maintains that Juror No. 32 should have been excused for cause, or peremptorily removed, demonstrating to the remaining jurors the full meaning and importance of the role of jurors as fair and impartial factfinders. The Sixth Amendment guarantees criminal defendants a verdict by an impartial jury. United States v. Martinez-Martinez, 369 F. 3d 1076, 1081 (9th Cir. 2004). The bias or prejudice of even a single juror is enough to violate that guarantee. United States v. Gonzalez, 214 F. 3d 1109, 1111 (9th Cir. 2000).

When the court has failed to respond to a biased juror on voir dire, counsel who fails to respond in turn is no longer functioning as "counsel" guaranteed the defendant by the Sixth Amendment. U.S. Const. Amend. 6 ; Hughes v. U.S., 258 F. 3d 453.

Subsequent to the trial court's refusal to remove Juror No. 32 for cause, Mr. Purtzer's performance was deficient when, in turn, he failed to respond accordingly, neglecting to use a peremptory challenge to remove the juror, resulting in the biased juror being impaneled and creating an aura of implied affirmation of biasedness, albeit unwittingly, tainting the jury panel as a whole. Consequently, this prejudiced Meredith's Sixth Amendment constitutional right to a fair trial by an

impartial jury, thus, establishing Meredith's Sixth Amendment claim of ineffective assistance of counsel.

3. Trial court abused its discretion in denying Meredith's challenge for cause.

Meredith argues that the trial court's refusal to excuse Juror No. 32 for cause violated his right to an impartial jury under the Sixth Amendment and Wash. Const. art. 1, sec. 22 (amend. 10). To protect this right, a juror will be excused for cause if his views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." State v. Hughes, 106 Wn. 2d 176, 181, 721 P. 2d 902 (1986) (quoting Wainwright v. Witt, 469 U.S. 412, 424, 105 S.Ct. 844 (1985)).

A trial court's denial of a challenge for cause is reviewed under an abuse of discretion standard. State v. Brett, 126 Wash. 2d 136, 158, 892 P. 2d 29 (1995).

The presiding trial judge has the authority and responsibility, either sua sponte or upon counsel's motion, to dismiss prospective jurors for cause. Hughes v. U.S., 258 F. 3d 453. If a potential juror demonstrates actual bias, the trial court must excuse that juror for cause. RCW 4.44.170(2); State v. Grenning, 142 Wn. App. 518,

174 P.3d 706 (Div. 2 2008). A defendant may obtain a new trial if an impaneled juror's honest responses to questions on voir dire would have given rise to a valid challenge for cause. U.S. Const. Amend. 6 ; Hughes v. U.S. , 258 F.3d 453.

Juror No. 32 unequivocally admitted a bias regarding a category of persons (persons previously convicted of a sex offense) and indicated his bias would likely affect his ability to be impartial. See State v. Gonzalez , 111 Wn. App. 276, 281-82, 45 P.3d 205 (Div. 1 2002) ; See State v. Witherspoon , 82 Wn. App. 634, 637-38, 919 P.2d 99 (1996).

Contained within Meredith's previous argument for ineffective assistance of counsel, he believes he has proven that Juror No. 32 clearly demonstrated actual bias and that he was not sufficiently rehabilitated. "Doubts regarding bias must be resolved against the juror." United States v. Martinez-Martinez , 369 F.3d 1076, 1082 (9th Cir. 2004) (quoting United States v. Gonzalez , 214 F.3d 1109, 1114 (9th Cir. 2000)).

[In some cases], the need to excuse a juror for actual bias will be so apparent that the trial court's refusal to do so will be deemed an abuse of discretion. See, e.g. State v. Parnell , 77 Wn.2d at 507.

In Meredith's previous argument he claimed his trial counsel was ineffective for failing to use a per-

emptory challenge on Juror No. 32, which, Meredith asserts seems illogical and unreasonable. Nonetheless, a defendant who elects not to use a peremptory challenge on a juror after the trial court denies a for-cause challenge to that juror can win reversal on appeal if he can show that the trial court abused its discretion in denying the for-cause challenge. See State v. Gonzales, 111 Wn. App. 276, 282, 45 P.3d 205 (Div. I 2002).

In concluding, if this court is to find that the trial court abused its discretion in refusing to excuse Juror No. 32 for cause or that Meredith's trial counsel was ineffective for failing to exercise a peremptory challenge on Juror No. 32 after the trial court denied Meredith's for-cause challenge, then Meredith respectfully requests this court to reverse and remand his convictions.

Ineffective Assistance of Appellate Counsel

Meredith argues that his appellate counsel was ineffective for failing to raise either of the issues above in Meredith's direct appeal. Had appellate counsel argued these errors in Meredith's direct appeal, Meredith believes he would have met the lower

threshold for showing prejudice on direct and his convictions would have been reversed. Considering this assertion, Meredith requests this court hold him to that lower standard for showing prejudice.

SECOND GROUND : IMPROPER JOINDER OF
OFFENSES PREJUDICED MEREDITH'S RIGHT TO
A FAIR TRIAL

Meredith argues his constitutional right to a fair trial by an unprejudiced or impartial jury was violated by the improper joinder of Count 1, second degree rape of a child (hereinafter "Count 1") with Count 2, communication with a minor for immoral purposes (hereinafter "Count 2" or "communication with a minor"). U.S. Const. Amend. 6 ; Wash. Const. art. 1, sec 22 (amend. 10).

1. Trial court abused its discretion by failing to sever Count 1 from Count 2 pursuant to CrR 4.4(2)(b).

Denial of severance is reviewed under the manifest abuse of discretion standard. RP 95.

The State argued in limine for the admission of Meredith's two prior sexual convictions, third degree rape and third degree assault with sexual motivation, in the form of certified copies, in order to prove an element in Count 2, communication with a minor, which elevates the charge to a felony if a defendant has previously been convicted of a sex offense. Also, the State argued that the two prior convictions are admissible under ER 404(b). RP 20-23, 26-29.

The court ruled to admit the evidence of the two prior convictions as an element of Count 2, as well as under the 404(b) exceptions of "absence of mistake or identity, also admissible for preparation, plan or motive." RP 29-30. Meredith took exception to the court's ruling arguing that the prior convictions are not admissible under 404(b) as well as to Count 2. Also, Meredith makes sure the court is aware that "he denies that anything occurred on Count 1 [and] he denies Count 2" RP 30-31.

Meredith moved to sever Count 1 from Count 2 arguing that the prior convictions "would not be admissible under any circumstances with respect to the rape of a child second degree." "There is no exception based on a prior situation in which Mr. Meredith was found guilty that would be admissible

under 404(b) analysis for purposes of proving [sic] any elements in rape of a child in the second degree." RP 62.

"Now, the Court has ruled they are admissible for purposes as an element for the communication with a minor." RP 62. Meredith reiterated his move to sever the two counts as it would be "impossible for the jury to properly compartmentalize ... the evidence that is being offered in communication with a minor charge ... to be used only for that particular offense. Not for any purpose in the rape of a child in the second degree." "[T]here is no basis in which that prior material should be offered in the rape of a child in the second degree. It is extremely prejudicial to Mr. Meredith to have that type of evidence before the jury. The only way to combat that is to sever the counts[.]"

"In order to be assured a fair trial, there is no instruction that I can think of that would protect [Meredith] and give him a right to a fair trial by an impartial jury to segregate evidence that might be relevant to Count 2 that should not be considered with Count 1 under the circumstances of this case. I would ask the Court to sever the trials with respect to Counts 1 and 2." RP 63.

"I truthfully believe there is no way the jury can segregate out evidence and limit it just directly

to the communication with a minor charge from that evidence. It's not going to be admissible ... in a separate trial ... for purposes of second degree rape charge."

RP 65.

"[A] limiting instruction that you can consider the evidence only for this count is simply insufficient. [T]he only way to assure that [Meredith] can have a fair trial in this case is to sever those particular counts. And under those circumstances then you can be guaranteed a fair trial." RP 67.

The trial court denied Meredith's motion to sever Count 1 from Count 2 by stating, "I am going to deny the motion to sever for the reasons I had already indicated on the admissibility of the certified records under 404(b). RP 70.

The court reiterated its denial of severance on Meredith's motion to reconsider after he provided some additional briefing, and the court affirmed its prior decision to admit Meredith's prior convictions to Count 1 and to Count 2, "specifically under 404(b)." RP 95-96.

It's Meredith's contention that the trial court's ruling in denying to sever Count 1 from Count 2 was in error and an abuse of discretion for all the reasons articulated above.

2. Trial court abused its discretion in admitting Meredith's prior convictions under ER 404(b).

The trial court admitted evidence of Meredith's two prior sex convictions under the 404(b) exceptions of "absence of mistake or identity, also admissible for preparation, plan or motive."

Meredith maintains that none of these 404(b) exceptions are applicable or relevant to Meredith's case for any probative or material reasons.

"Identity" is not an issue. "The claim is and as stated by Mr. Schacht (prosecutor) yesterday, he was going to have witnesses identify Mr. Meredith. That is not something that would be at issue for purposes of whether or not he is the individual[.]" RP 84.

"Intent" in this particular case is not an issue. "There is no intent element for purposes of a rape charge; rape of a child or person cannot have intent once the act is allegedly committed." RP 80.

"Absence of mistake" "has no merit and is not applicable under... circumstances of general denial." RP 80. "[W]e are not willing to stipulate that there was a mistake, or there is some mistake made. He is denying that he is the person." RP 25

"Motive" "[T]here is nothing that can be drawn from the prior convictions that would establish that in some fashion Mr. Meredith's prior convictions motivated him to commit the offense this particular time." RP 84.

"Preparation; Plan" "What is important is that the mere similarity is not sufficient, you must have some type of over arching(sic) plan." RP 81. "With respect to Meredith's case, there is no evidence in any of the prior convictions that any type of preplanning was done[.]" RP 82. "[A]side from being the fact of prior convictions of sexual offenses there is no establishment that there is some type of common scheme or that is being done by one single mastermind under the circumstances of Lough [125 Wn. 2d 847(1995)].

"The Lough case is very clear on pointing out that you must avoid situations to where you confuse similarity with common scheme or plan." RP 83.

The general similarity of the prior offenses and the crime charged is insufficient to establish a design or plan to commit the charged offense. State v. Hieb, 39 Wash. App. 273, 693 P.2d 145 (Div. 1 1984).

Meredith's prior convictions are irrelevant and have no probative value in proving Meredith committed either Count 1 or Count 2. The prejudicial impact these convictions can have on a jury is overwhelming. And

they're not relevant in any material way to Meredith's current offenses, they can only be considered as propensity evidence, which is inadmissible. Therefore, the only conclusion that can be drawn is the trial court abused its discretion in admitting Meredith's prior convictions under ER 404(b).

3. Insufficient Limiting Instruction

Meredith argues that the limiting instruction the trial court gave to the jury regarding the consideration of his prior convictions was insufficient.

Meredith requested a limiting instruction be given to the jury pertaining to the prior conviction evidence and how the jury is to consider that evidence. RP 96.

The instruction given to the jury as Instruction No. 14 in the Court's Instructions To The Jury reads:

Evidence that the defendant has previously been convicted of a crime is not evidence of the defendant's guilt. Such evidence may be considered by you in deciding Count II and for no other purpose.

Meredith argues that this instruction is

inadequate as there is nothing pertaining to how or for what purposes the jury is to consider the prior convictions under 404(b).

Also, there is nothing specific pertaining to the evidence being applied to prove the felony element of Count 2.

Meredith believes he was prejudiced by the insufficiency of the limiting instruction as it is very vague and doesn't specifically instruct the jury on how to apply the very prejudicial evidence.

4. The statute for Communication With a Minor for Immoral Purposes, RCW 9A.68A.090, is in conflict with ER 404(b) regarding the admission of prior conviction evidence.

Meredith argues that the level of prejudice that results from the admission of prior sex convictions to only prove an element that elevates a communication with a minor charge from a misdemeanor to a felony is too overwhelming for a jury to compartmentalize for that purpose only.

The prior conviction has no material relevance in proving whether a defendant committed communication with a minor. It is an element that is more of

a sentencing issue, an element for the trial judge to consider at sentencing. See CP—, p.8. Or, the felony element of communication with a minor should only need to be proved by the jury once the jury has already determined that a defendant met the other elements that are material to the actual crime. Only then should a jury become aware of a defendant's prior sex conviction(s), notwithstanding being properly admitted under 404(b) or for impeachment purposes.

Meredith asserts that when a defendant's prior sexual convictions are admitted for the purposes of proving the felony element of communication with a minor, but would be inadmissible under the Evidence Rule 404(b), it results in a conflict to the admission standards of the evidence and it constitutes an abuse of separation of powers.

The Supreme Court in State v. Gresham, 173 Wn. 2d 405, 269 P.3d 207 (2012) began with a settled point of law — that rules of court control over conflicting statutes on matters of procedure. The Court stated:

“Our separation of powers jurisprudence relating to legislative enactments alleged to conflict with court rules is well developed. The power to proscribe rules

for procedure and practice is an inherent power of the judicial branch... and flows from article IV, sec. 1 of the Washington Constitution... If a statute appears to conflict with a court rule, this court will first attempt to harmonize them and give effect to both... If the statute and the rule cannot be harmonized, the court rule will prevail in procedural matters and the statute will prevail in substantive matters. "

The Court then nailed down the proposition that the admissibility of evidence is procedural and not a matter of substantive law :

"The admission of evidence in a criminal trial is generally a procedural matter. Definition of the crime and its punishment are substantive matters ; admission of evidence is simply the means by which the substantive law is effectuated."

Therefore, Meredith argues, the admission of prior conviction(s) to prove only the felony element of RCW 9A.68A.090, Communication With a Minor for Immoral Purposes is an unconstitutional violation of the separation of powers doctrine because it irreconcilably conflicts with ER 404(b).

The result of this conflict in Meredith's case was the admission of his prior convictions to prove

only the felony element of Count 2, but were erroneously admitted under 404(b), prejudiced the jury and violated Meredith's constitutional right to a fair trial by an impartial, unprejudiced jury under the Sixth Amendment to the U.S. Constitution and article 1, section 22 of the Washington Constitution.

Meredith respectfully requests this court to reverse his convictions, or, if the court finds that only the second degree rape of a child conviction was prejudiced, then Meredith requests this court to reverse that conviction and remand for a retrial on one or both convictions.

MISCALCULATION OF OFFENDER SCORE

1. SENTENCING COURT FAILED TO MAKE THE REQUIRED DETERMINATION WHETHER TO COUNT MEREDITH'S PRIOR OFFENSES THAT WERE SERVED CONCURRENTLY AS ONE OFFENSE OR AS SEPARATE OFFENSES PURSUANT TO FORMER RCW 9A.360(6)(a).

FACTS RELEVANT TO ARGUMENT

On June 10, 1996, after a jury trial, Meredith was convicted of one count of second degree child rape and one count of communication with a minor for immoral purposes. The date of crime for both offenses was 10/29/94. Meredith was sentenced on 11/21/08 to 198 months.

See Appendix C.

At the time of sentencing, the petitioner, Meredith, had two prior adult felony convictions, third degree rape, sentenced on 12/17/91, and third degree assault with sexual motivation, sentenced on 3/26/92. Both sentences were served concurrently with one another. See Appendix D.

In the current offense, Meredith's offender score was calculated to be 9, counting 3 points each for Meredith's prior convictions, plus 3 points for Meredith's other current offense. See Appendix A.

The sentencing judge never made a determination on the record whether to count Meredith's two prior convictions as one offense or as separate offenses as required by former RCW 9A.360(6)(a), the applicable statute in 1994.

ARGUMENT OF THE ISSUE

The date of crime for Meredith's current offense was October 29, 1994.

Under the Sentencing Reform Act of 1981 (SRA), sentencing courts are to apply the definition of criminal history in effect at the time the offense was committed to calculate the sentence for that offense. In re LaChapelle, 153 Wn.2d 1, 100 P.3d 805 (2004).

Any sentence imposed under Chapter 9.94A RCW shall be determined in accordance with the law in effect when the current offense was committed.

The 2000 Amendment to the SRA — Substitute Senate Bill 6182.

The incorrect calculation of an offender score constitutes a fundamental defect in sentencing resulting in a complete miscarriage of justice which requires relief in a personal restraint proceeding under RAP 16.4. In re Connick, 144 Wn.2d 442, 465, 28 P.3d 729 (2001). A sentencing court acts without statutory authority under the SRA when it imposes a sentence based on a miscalculated offender score. State v. Roche, 75 Wash. App. 500, 513, 878 P.2d 497 (1994). An illegal or erroneous sentence may be challenged for the first time on appeal. State v. Ashenberger, 171 Wn. App. 237, 286, P.3d 984 (2012). The appropriate standard of review of the sentencing court's calculation of an offender score is de novo. State v. Roche, supra.

Former RCW 9.94A.360(6)(a) provided as follows:

In the case of multiple prior convictions, for the purposes of computing the offender score, count all convictions separately, except:

(a) Prior adult offenses which were found, under RCW 9.94A.400(1)(a), to encompass the same criminal conduct, shall be counted as one offense, the offense that yields the highest offender score. The current sentencing court shall determine with respect to other prior adult offenses for which sentences were served concurrently whether those offenses shall

be counted as one offense or as separate offenses, and if the court finds that they shall be counted as one offense, then the offense that yields the highest offender score shall be used [.]

Former RCW 9.94A.400(1) has no application to Meredith's offender score issue because there was no showing that the previous sentencing court had determined that Meredith's prior offenses encompassed the same criminal conduct.

"[RCW 9.94A.360(6)(a)] does not restrict the current sentencing court to the previous sentencing court's determination or to the application of the same criminal conduct standard imposed pursuant to RCW 9.94A.400(1)(a)."

State v. McCraw, 127 Wn.2d 281, 287, 898 P.2d 838 (1995) (quoting State v. Lara, 66 Wn.App. 927, 931, 834 P.2d 70 (Div. 3 1992).

Interpretation of a statute is a question of law that appellate court reviews de novo. State v. Ashenberger, 171 Wn.App. at 237. When interpreting a statute, the court's objective is to determine the Legislature's intent. If the meaning of the statute is plain on its face, courts give effect to that plain meaning.

State v. Crawford, 164 Wn.App. 617, 367 P.3d 365 (2011).

The first sentence of subsection (a) of former RCW 9.94A.360(6) consists of prior adult offenses that a previous sentencing court had determined encompassed the same criminal conduct. As previously noted, this has no application here.

The second sentence of subsection (a) consists of other prior adult offenses for which sentences were served concurrently. This sentence "refers to the duty of a sentencing court to count prior multiple offenses for which sentences were served concurrently as either one offense or separate offenses." State v. McCraw, 127 Wn.2d at 287.

The court in *State v. Wright*, 76 Wn. App. 811, 838 P.2d 1214 (Div. 1 1995) said:

"[T]he language of the statute is mandatory, stating that the current sentencing court shall determine whether the offenses are to be counted as one or separate offenses. RCW 9.94A.360(4)(a). Because the court did not exercise its discretion to make the required determination, we remand with instructions that it do so." *State v. Wright*, 76 Wn. App. at 829.

The court in *State v. Reinhart*, 77 Wn. App. 454, 891 P.2d 735 (Div. 2 1995) said: "[T]he language of the statute appears clear and unambiguous in mandating that the current sentencing court determine whether to count prior offenses, served concurrently, as separate offenses. The trial court did not make such a determination in this case. Thus, the appropriate remedy is remand for such determination[.]" *State v. Reinhart*, 77 Wn. App. at 459.

In Meredith's sentencing hearing, the judge failed to exercise the required determination on the record whether to count his prior adult offenses for which sentences were served concurrently as one offense or as separate offenses pursuant to former RCW 9.94A.360(4)(a).

[S]entencing decisions under the SRA must comport with requirements of due process. [A]ny action taken by the sentencing judge which fails to comport with due process requirements is constitutionally impermissible.

State v. Herzog, 112 Wn.2d 419, 426, 771 P.2d 739 (1989); U.S. Const. Amend. 14, sec. 1; Wash. Const. art. 1, sec. 3.

Meredith respectfully requests this court to remand for resentencing for the required determination to be made pursuant to former RCW 9.94A.360(4)(a) of whether to count Meredith's prior concurrently served offenses as one or as separate offenses.

2. SENTENCING COURT SHOULD HAVE COUNTED MEREDITH'S PRIOR ADULT OFFENSES FOR WHICH SENTENCES WERE SERVED CONCURRENTLY AS ONE OFFENSE IN HIS OFFENDER SCORE PURSUANT TO FORMER RCW 9.44A.360(6)(c).

Meredith's two prior adult offenses for which sentences were served concurrently were counted separately as 3 points each in his offender score, plus 3 points for his other current offense, for a total offender score of 9. Meredith maintains his prior adult offenses should have been counted as one offense for a total offender score of 6.

Former RCW 9.44A.360(6)(c) provides in relevant part to Meredith's argument:

The current sentencing court shall determine with respect to other prior adult offenses for which sentences were served concurrently whether those offenses shall be counted as one offense or as separate offenses [.]

Interpretation of a statutory provision is a question of law that is reviewed de novo. *State v. Haddock*, 141 Wn.2d 103, 3 P.3d 733 (2000).

The statute is clear that there will be some prior adult offenses which were served concurrently that shall be counted as one offense, as well as other prior adult offenses which were served concurrently that shall be counted as separate offenses. But the statute doesn't provide any guidance or direction as to which prior adult offenses for which sentences were served concurrently shall be counted as one offense or as separate offenses.

Considering that the "same criminal conduct" standard is not applicable to this part of the statute, what distinguishes one group of prior adult offenses served concurrently from any other group of prior adult offenses served concurrently? What might be the determinant factor of whether prior adult offenses served concurrently are counted as one offense or as separate offenses?

When looking at the plain language of the statute it's clear that the phrase "served concurrently" is the crux of determining whether to count prior concurrent offenses as one or as separate offenses. Therefore, the definition of "served concurrently" is the pertinent factor in this determination.

In LAWS OF 1995, ch. 316, sec. 1, the Legislature defined "served concurrently" by adding the following definition to RCW 9.94A.360(6)¹:

As used in this subsection (6), "served concurrently" means that:

- (i) The latter sentence was imposed with specific reference to the former;
- (ii) the concurrent relationship of the sentences was judicially imposed; and
- (iii) the concurrent timing of the sentences was not the result of a probation or parole revocation on the former offense.

¹ This provision was codified at RCW 9.94A.360(6)(b) and is currently found at RCW 9.94A.525(5)(b).

Consequent to this statutory definition of "served concurrently," prior offenses for which sentences were served concurrently were basically bifurcated into two groups for the purposes of the offender score:

- (1) Prior concurrent offenses that meet the definition's criteria; and
- (2) prior concurrent offenses that do not meet the definition's criteria.

The petitioner, Meredith, contends that the most reasonable interpretation of former RCW 9.94A.360(6)(a) is that prior adult offenses that meet the statutory definition of "served concurrently" shall be counted as one offense in the offender score, and those that do not meet the statutory definition shall be counted as separate offenses.

Meredith's prior convictions meet the statutory definition of "served concurrently." Meredith's sentence for his 1992 prior conviction was judicially imposed to be served concurrently with specific reference to his sentence for his 1991 prior conviction and was not the result of a probation or parole revocation. See Appendix B.

Prior to the 1995 Legislature adding the definition of "served concurrently" to RCW 9.94A.360(6), the interpretation of the statute adopted by previous courts was that sentencing courts use discretion in determining whether to count prior adult offenses which were served concurrently as one or separate offenses. With no guidance from the statutory definition of "served concurrently" that previous interpretation was reasonable, but it also left the door open to the possibility of unjust or absurd results.

For purposes of former RCW 9.94A.360(6)(a), it would be utterly inconsistent if two defendants with identical conviction histories of prior adult concurrently served offenses were treated differently to one another with one defendant's prior convictions scored as one offense and the other defendant's

prior convictions scored as separate offenses. The equal protection clauses of both the Federal and State Constitutions require persons similarly situated with respect to the legitimate purpose of the law must receive like treatment.

U.S. Const. Amend. 14 ; Wash. Const. art. I, sec. 12.

"[O]ur purpose is to preserve the integrity of the sentencing laws" and to avoid widely varying sentences. *State v. Mendoza*, 165 Wn.2d 913, 920, 205 P.3d 113 (2009) (citing *State v. Ford*, 137 Wn.2d 472, 478, 973 P.2d 452 (1999)).

By defining the term "served concurrently" with specific criteria that must be met, the Legislature provided guidance to the sentencing courts that would preclude the sort of aforementioned absurd result and avoid widely varying sentences that could be possible under the interpretation adopted by previous courts.

The most logical factor in determining whether prior adult offenses served concurrently shall be counted as one offense or as separate offenses is the statutory definition of the term "served concurrently."

A "determination" doesn't necessarily have to consist of unrestricted discretion. It can just as well be a finite decision that is based on certain limits or criteria.

That being said, and in light of the Legislature defining "served concurrently," the petitioner contends that the most reasonable interpretation of former RCW 9.94A.360(6)(c) is that the sentencing court shall make a finite determination to count those "other prior adult offenses for which sentences were served concurrently" that meet the statutory definition of "served concurrently" as one offense, and to count those "other prior adult offenses for which sentences were served concurrently" that do not meet the statutory definition of "served concurrently" as separate offenses.

This interpretation suggested by the petitioner does not take one outside of the plain meaning of the statute. Under this interpretation the sentencing

court must still make the required determination, but that the sentencing court base this determination on whether those prior adult offenses meet the statutory definition of "served concurrently."

To be reasonable, an interpretation must, at a minimum, account for all the words in a statute. *State v. Johnson*, 2014 WL 70549 (Wash. 2014). A statute is ambiguous if it is susceptible to two or more reasonable interpretations. *State v. Garrison*, 46 Wn. App. 52, 728 P.2d 1102 (1986).

One other reasonable interpretation, mentioned previously, of former RCW 9.94A.360(6)(a), is that the sentencing court has unrestricted discretion whether to count other prior offenses for which sentences were served concurrently as one or as separate offenses, but, as argued previously, could lead to absurd or unjust results. If the statute is ambiguous, the courts must construe the statute so as to effectuate the legislative intent. *State v. Elgin*, 118 Wn.2d 551, 555, 825 P.2d 314 (1992).

"We are confident that the Legislature's true intent was to include one offense in criminal history when prior concurrent sentences were JUDICIALLY IMPOSED for more than one offense, regardless of whether the concurrent sentences arose out of the same or separate incidents."
State v. Lara, 66 Wn. App. at 931.

If a criminal statute is ambiguous, the "rule of lenity" requires the court to interpret the statute in favor of the defendant absent legislative intent to the contrary. The rule of lenity requires the court to construe a statute strictly against the State in favor of the defendant where two possible constructions are permissible. *State v. Breaux*, 167 Wn. App. 166, 273 P.3d 447 (Div. I 2012). This rule was held applicable to the SRA in *State v. Henderson*, 48 Wn. App. 543, 740 P.2d 329 (1987).

Meredith believes that the rule of lenity applies in his case since two or more reasonable interpretations seem possible. The most reasonable interpretation of former RCW 9A.360(6)(a) is that of which is championed by Meredith as it seems to best express the intent of the Legislature to count as one offense those prior adult offenses for which sentences were "truly" served concurrently. Meredith contends that his suggested interpretation is the reading required by the rule of lenity.

Meredith respectfully requests that this court remand for resentencing for a recalculation of Meredith's sentence consistent with the interpretation of the statute advocated by Meredith to count his prior judicially imposed concurrent offenses as one offense as the court in *State v. Lara* stated was the Legislature's true intent.

3. MEREDITH'S TWO PRIOR CONCURRENTLY SERVED CONVICTIONS SHOULD
BE COUNTED AS ONE OFFENSE PURSUANT TO FORMER RCW 9.94A.
360(6)(a) AND THE SUPREME COURT'S RULING IN STATE V. BOLAR

Bolar, State v. Bolar, 129 Wn.2d 361, 917 P.2d 125 (1996) is distinguishable from Meredith in that Bolar had four concurrently served adult convictions, two of which constituted the same criminal conduct and were counted at sentencing as one offense, and two that were not the same criminal conduct and were counted as separate offenses. State v. Bolar at 363. Meredith has two prior concurrently served adult convictions that were not the same criminal conduct and were counted as separate offenses.

The Supreme Court agreed with Bolar that the sentencing court was required to count all four of his prior concurrently served convictions as one offense pursuant to RCW 9.94A.360(6)(a) once the sentencing court decided to group together any of the prior convictions for which sentences were served concurrently. The Court remanded for resentencing "for recalculation of Bolar's sentence consistent with this decision." Bolar at 367. Upon resentencing, the court counted all of Bolar's concurrently served convictions as one offense. See Appendix E.

As noted previously in this petition, former RCW 9.94A.360(6)(a) does not restrict the current sentencing court to the application of the same criminal conduct standard. State v. Lara, 66 Wn. App. at 931.

Meredith contends that his two prior concurrently served convictions should be counted as one offense pursuant to former RCW 9.94A.360(6)(a) just as Bolar's prior concurrently served convictions were counted as one offense. Must Meredith need to have a more extensive criminal history that includes additional concurrently served convictions, such as Bolar's, for his two concurrently served convictions to be counted as one

offense as Bolar's were?

Meredith respectfully requests this court to remand for resentencing for recalculation of Meredith's sentence consistent with the Supreme Court's ruling in Bolar and count Meredith's two prior concurrently served adult offenses as one offense pursuant to former RCW 9.94A.360(6)(a).

4. MEREDITH'S PRIOR CONCURRENTLY SERVED OFFENSES
SHOULD BE COUNTED AS ONE OFFENSE PURSUANT TO
FORMER RCW 9.94A.360(6)(a) AND STATE V. MCCRAW

The sentencing court in *State v. McCraw*, 127 Wn.2d 281 (1995), counted each of McCraw's three groups of prior concurrently served adult offenses as one offense per group. McCraw at 285.

When the Supreme Court in *McCraw* upheld the sentencing court's use of discretion pursuant to RCW 9.94A.360(6)(a), the Court basically affirmed the sentencing court's ruling to count each group of McCraw's prior concurrently served adult convictions as one offense. McCraw at 290.

It's Meredith's contention, for purposes of former RCW 9.94A.360(6)(a), that defendants whose prior adult offenses meet the statutory definition of "served concurrently" should receive like treatment with that of other defendants whose prior adult offenses meet the statutory definition of "served concurrently" with respect to determining whether those offenses shall be counted as one or as separate offenses. Equal protection requires that persons similarly situated with respect to the legitimate purpose of the law must receive like treatment. U.S. Const. Amend. 14; Wash. Const. art. I, sec. 12.

Meredith argues that both his and McCraw's prior adult offenses meet the statutory definition of "served concurrently", see Appendix D see McCraw at 284-85, and that his prior concurrently served offenses should be treated the same as McCraw's and be counted as one offense in his offender score.

Meredith respectfully requests this court to remand for resentencing for recalculation of his sentence with instructions to count his two prior concurrently served convictions as one offense consistent with the sentencing court in State v. McCraw, pursuant to former RCW 9A.4A.360(6)(a).

5. INEFFECTIVE ASSISTANCE OF COUNSEL AT SENTENCING

COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO MEREDITH'S OFFENDER SCORE CALCULATION PERTAINING TO HIS PRIOR CONCURRENTLY SERVED OFFENSES PURSUANT TO FORMER RCW 9.94A.360(6)(a).

To demonstrate ineffective assistance of counsel, the defendant must show: (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed 2d 674 (1984). U.S. Const. Amend. 6; *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

Meredith's counsel failed to object when the prosecutor stated that each of Meredith's two prior felonies will count as 3 points each. RP 613-14.

As previously argued in this brief, the sentencing judge failed to make the required determination on the record whether to count Meredith's prior adult concurrently served offenses as one or separate offenses pursuant to former RCW 9.94A.360(6)(a). The judge simply counted Meredith's prior offenses as separate offenses. RP 644.

Counsel's performance was deficient for not objecting to the calculation of Meredith's prior offenses pursuant to former RCW 9.94A.360(6)(a), the applicable statute for the date of crime of October 29, 1994.

Counsel's representation fell below an objective standard of reasonableness. Counsel's deficient performance prejudiced Meredith because there is a reasonable probability that had counsel objected and brought forth a proper argument to count Meredith's prior offenses as

one offense pursuant to former RCW 9A4A.360(6)(a), the result of the proceeding would have been different.

Meredith respectfully requests this court to remand for resentencing for the required determination to be made pursuant to former RCW 9A4A.360(6)(a) with instructions to count Meredith's two prior concurrent offenses as one offense consistent with his arguments above, including following the *Bolar* and *McCraw* courts.

8. CUMULATIVE ERROR DOCTRINE

MR. MEREDITH ARGUES THAT THE CUMULATIVE EFFECT OF THE TRIAL ERRORS DEPRIVED HIM OF HIS RIGHT TO A FAIR TRIAL UNDER BOTH THE WASHINGTON CONSTITUTION ARTICLE I, SECTION 22 AND THE FOURTEENTH AMENDMENT

The cumulative effect of the trial court errors deprived Meredith of his right to a fair trial under both the state and federal constitutions. Under the Cumulative Error Doctrine, a defendant may be entitled to a new trial when errors, even though individually not reversible errors, cumulatively produced a trial that was fundamentally unfair, *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000).

Under *State v. Ezequiel Apolo-Albino*, 173 Wn.2d 1009, 268 P.3d 941 (2011), "It appears that Washington courts have expanded this doctrine to include not only errors of the court, but also unreasonable conduct by defense counsel." See *Goldman v. State*, 57 So. 3d 274, 278 (Fla. Dist. Ct. App. 2011). (Reversing defendant's conviction

based on the cumulative effect of defense counsel's errors that did not individually satisfy prejudice prong) *Malone v. Walls*, 538 F.3d 744, 762 (7th Cir. 2008) (Remanding to the district court to consider whether defense counsel's cumulative errors prejudiced defendant even though they did not rise to the level of ineffective assistance standing alone.)

Reversal is necessary if "it appears reasonably probable that the cumulative effect of those errors materially affected the outcome," *State v. Johnson*, 90 Wash. App. 54, 950 P.2d 981 (1998).

Keeping in mind that this burden represents a fairly low threshold. See *Sanders v. Batelle*, *supra* (stating that a "reasonable probability" is actually a lower standard than preponderance of the evidence.)

CONCLUSION

Throughout this entire case Mr. Meredith's right to a fair trial and due process guaranteed by the Fourteenth Amendment was violated. The cumulative effect of defense counsel's deficient representation prejudiced Meredith to where there is a reasonable probability that, except for counsel's errors, the result of Meredith's trial would have been different.

Mr. Meredith respectfully requests that this court reverse his convictions and remand for a new trial, or at the very least send this case back for an evidentiary hearing or reference hearing to the totality of the issues raised in this Personal Restraint Petition and to be appointed competent counsel in the representation of future proceedings.

If this court does not conclude a reversal of the convictions is warranted, then Mr. Meredith respectfully requests that this court remand for resentencing with instructions to count his two prior adult concurrently served convictions as one offense in his offender score, or, at the very least, remand for resentencing for the sentencing court to make the required determination on the record pursuant to former RCW 9A.04.360(c)(a).

I, GARY MEREDITH, swear under laws of perjury that the entire contents of this personal restraint petition is true and correct.

Gary Meredith

GARY MEREDITH

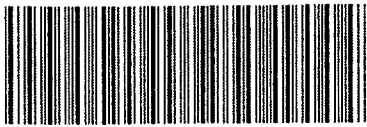
DOC # 984777

DATED 1-27-15

Gary Meredith

STAFFORD CREEK
CORRECTION CENTER
191 Constantine Way
H4-B38
Aberdeen, WA 98520

APPENDIX A



95-1-04949-6 4731533 JYPSL 01-02-09

COUNTY SUPERIOR COURT
ADMINISTRATION

252 1/5/2009 120091

5/02, --

CASE INFO SHEET - RANDOM

Page 1

CASE NO:95-1-04949-8

DEPT:5

JUDGE:Hogan, Vicki L.

SEAT	JUROR NAME	PER 1	STP 2	CSE 3	NR 4	SWN 5	ALT 6	BADGE #
1	MEYKRS, BARBARA A	()	()	()	()	(X)	()	292406
2	LESIEUR, STEVEN C	(X)	()	()	()	()	()	292311
3	WORSLEY, DONNA G	(X)	()	()	()	()	()	292881
4	CURRIE, ALICE N	(X)	()	()	()	()	()	291925
5	HALL, BARBARA A	(X)	()	()	()	()	()	292106
6	SATHER, ROBERT LEONARD	(X)	()	()	()	()	()	292619
7	PETROVICH, MAILE M	(X)	()	()	()	()	()	292508
8	PIPPIN, JIMMY E	()	()	()	()	(X)	()	292519
9	VIGNEC, RONALD PIERRE	()	()	(X)	()	()	()	292813
10	HOWELL, GORDON W	()	()	(X)	()	()	()	292181
11	PLUMB, TERRANCE R	()	()	()	()	(X)	()	292522
12	WARD, WILLIAM R	(X)	()	()	()	()	()	292835
13	VOGEL, SHELDIA M	()	()	()	()	(X)	()	292817
14	HANSON, JOAN Y	()	()	()	()	(X)	()	292118
15	GREENWOOD, THOMAS A	()	()	()	()	(X)	()	278333
16	WENDLAND, WALTER	()	()	()	()	(X)	()	292850
17	EDENBO, DONALD GEORGE	()	()	()	()	(X)	()	291975
18	SIMMONS, VERNE W	(X)	()	()	()	()	()	292670
19	REDA, LARRY	(X)	()	()	()	()	()	292558
20	SUVER, JANICE L	()	()	()	()	(X)	()	292747
21	HIBBARD IV, EDWARD A	()	()	(X)	()	()	()	292151
22	KELLEY, MICHAEL B	()	()	(X)	()	()	()	292249
23	WYLIE, SHARON L	()	()	()	()	(X)	()	292885

NUMBER OF JURORS THIS GROUP: 24 23

3 MAY 13 1996

PROBATE COUNTY SUPERIOR COURT
JURY ADMINISTRATION

252 1/5/2009 120092

5/02/96

CASE INFO SHEET - RANDOM

Page 2

CASE NO:95-1-04949-6

DEPT:5

JUDGE:Hogan, Vicki L.

SEAT	JUROR NAME	PER 1	STP 2	CSE 3	NR 4	SWN 5	ALT 6	BADGE #
24	KELLY, HAROLD M	()	()	()	()	(X)	()	292251
25	GODWIN, REDERIC L	()	()	(X)	()	()	()	292070
26	KITZMAN, ARTHUR L	()	()	(X)	()	()	()	292271
27	WAHLSTROM, CHARLES D	(X)	()	()	()	()	()	292828
28	DUCOLON, KATHLEEN L	(X)	()	()	()	()	()	291968
29	FALLSTONE, KRISTINA	(X)	()	()	()	()	()	291998
30	ARMSTRONG, CRAIG W	()	()	(X)	()	()	()	291737
31	CARTER, DAVID MICHAEL	(X)	()	()	()	()	()	291852
32	KOSTELECKY, OTTO	()	()	()	()	(X)	()	292278
33	PROVENCHER, MARC BRUNO	(X)	()	()	()	()	()	292539
34	MORGAN, GEORGE M	()	()	(X)	()	()	()	292426
35	JARZYNSKA, DEBRA J	()	()	()	()	(X)	()	292211
36	WHITSELL, JOHN M	()	()	(X)	()	()	()	292858
37	TALLEY, CARLA M	()	()	(X)	()	()	()	292752
38	RUSSELL, RANDY D	()	()	(X)	()	()	()	292606
39	BAKER, BOYD	()	()	()	()	(X)	()	291755
40	NOFFKE, RUSSELL H	()	()	(X)	()	()	()	292460
41	WAGGENER, CHARLES R	()	()	()	()	()	()	292824
42	ANDERSON, BARRY K	()	()	()	()	()	()	291723
43	JENKINS, MICHELLE	()	()	()	()	()	()	292214
44	ROBERTS, NANCY D	()	()	()	()	()	()	292584
45	OBERLE, JOHN P	()	()	()	()	()	()	292467

State 17298

Defense 17203

Vicki L Hogan 5/6/96
Judge Date

NUMBER OF JURORS THIS GROUP: 45

APPENDIX B

AFFIDAVIT

Pursuant to 28 U.S.C. § 1746 No Notary Required

AFFIDAVIT OF Ryanne Robertson

I, Ryanne Robertson, declare on oath and say on penalty of perjury under the laws of the State of Washington that all of the following is true and correct, and based on my direct observations or sound conclusions from these:

1. I am over the age of 18, of sound mind, and I am competent to testify, I am a residence of Washington.

2. On January 5, 2015 I spoke to Mr. Brett Purtzer, Attorney, of Hester Law Group, Inc., P.S., 1008 S. Yakima Ave., Suite 302 Tacoma, WA 98405. This phone call was in reference to State vs Gary Daniel Meredith, Case No. 95-1-04949-6. Mr. Meredith hired Mr. Purtzer in 1996 to defend him in this case which resulted in a jury trial.

The reason for the call was to ask Mr. Purtzer if he had in his possession, the document(s) that showed proof of: the number of peremptory challenges that were afforded by the court to each side, the defense number and State number? Also, if he recalled the number of peremptory challenges exercised by the defense? Also were all peremptory challenges afforded to the defense used?

Mr. Purtzer answered, he remembered it being a total of 14, an even split of 7-7. Meaning 7 peremptory challenges for the State, and the same for the defense; and yes, all were used. He (Mr. Purtzer) told me he would go to the court building to try to find the document for me. After not hearing back from Mr. Purtzer in over a weeks' time I called the Pierce County Superior Court Clerk's Office, on January 15, 2015. I spoke to a lady and explained to her what it was I was trying to obtain. She said she knew exactly what I'm looking for. She searched for the document but could not find it and made the determination that it was not filed.

I called Mr. Purtzer on Jan 16, 2015. He told me there isn't a copy of the side bar in question, because it wasn't recorded and filed in 1996, because in "those" days, it didn't have to be.

I, Rayanne Robertson, am over the age of majority and am also a U.S. citizen competent to testify and herein attest under penalty of perjury that all the statements contained herein is the absolute truth.

Affidavit pursuant to 28 U.S.C. § 1746 and UNITED STATES v. KARR 928 F.2d 1138 (9th Cir. 1981) sworn as true and correct under penalty of perjury has full force of and is not required to be verified by notary public.

Respectfully submitted on this 23 day of January, 2015, in the State of Washington.

Rayanne Robertson
Signature

Rayanne Robertson
Print Name

4001 S. 17th St.
Address

Tacoma Wa. 98405
City State Zip

APPENDIX C

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON,

Plaintiff,

vs.

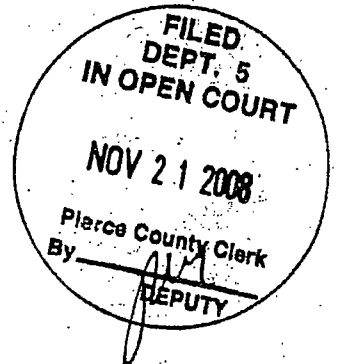
GARY DANIEL MEREDITH,

Defendant.

CAUSE NO. 95-1-04949-6

JUDGMENT AND SENTENCE
(FELONY/OVER ONE YEAR)

NOV 21 2008



DOB: 6/13/70
SID NO.: WA15494138
LOCAL ID:

I. HEARING

- 1.1 A sentencing hearing in this case was held on 11-21-08
- 1.2 The defendant, the defendant's lawyer, BRETT PURTZER, and the deputy prosecuting attorney, JAMES S. SCHACHT, were present.

II. FINDINGS

There being no reason why judgment should not be pronounced, the court FINDS:

- 2.1 CURRENT OFFENSE(S): The defendant was found guilty on June 10, 1996 by
[] plea [X] jury-verdict [] bench trial of:

Count No.: I
Crime: RAPE OF A CHILD IN THE SECOND DEGREE, Charge Code: (I37)
RCW: 9A.44.076
Date of Crime: 10/29/94
Incident No.: TPD 94 307 0871

Count No.: II
Crime: COMMUNICATION WITH A MINOR FOR IMMORAL PURPOSES, Charge Code: (I3)
RCW: 9.68A.090
Date of Crime: 10/29/94
Incident No.: SAME

- [] Additional current offenses are attached in Appendix 2.1.
[] A special verdict/finding for use of deadly weapon other than a firearm was returned on Count(s).

JUDGMENT AND SENTENCE
FELONY / OVER ONE YEAR - 1

089-14635-0

Office of Prosecuting Attorney
946 County-City Building
Tacoma, Washington 98402-2171
Telephone: 591-7400

- [] A special verdict/finding for use of a firearm was returned on Counts ____.
- [] A special verdict/finding of sexual motivation was returned on Count(s) ____.
- [] A special verdict/finding of a RCW 69.50.401(a) violation in a school bus, public transit vehicle, public park, public transit shelter or within 1000 feet of a school bus route stop or the perimeter of a school grounds (RCW 69.50.435).
- [] Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number):

- [] Current offenses encompassing the same criminal conduct and counting as one crime in determining the offender score are (RCW 9.94A.400(1)):

2.2 CRIMINAL HISTORY: Prior convictions constituting criminal history for purposes of calculating the offender score are (RCW 9.94A.360):

CRIME	DATE OF SENTENCING	SENTENCING COUNTY/STATE	DATE OF CRIME	ADULT OR JUV.	CRIME TYPE	CRIME ENHANCEMENT
RAPE 3	12/17/91		7/19/91	ADULT	SEX	
ASLT 3 W/SEX MOT	3/26/92		12/17/91	ADULT	SE X	

- [] Additional criminal history is attached in Appendix 2.2.
- [] Prior convictions served concurrently and counted as one offense in determining the offender score are (RCW 9.94A.360(11)):

2.3 SENTENCING DATA:

	Offender Score	Serious Level	Standard Range(SR)	Enhancement	Maximum Term
Count I:	9	X	149-198 mos		LIFE
Count II:	9	III	51-60 mos		5yrs/\$10,000

- [] Additional current offense sentencing data is attached in Appendix 2.3.

JUDGMENT AND SENTENCE
FELONY / OVER ONE YEAR - 2

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Tacoma, Washington 98402-2171
Telephone: 591-7400

4.2 CONFINEMENT OVER ONE YEAR: The defendant is sentenced as follows:

(a) CONFINEMENT: (Standard Range) RCW 9.94A.400. Defendant is sentenced to the following term of total confinement in the custody of the Department of Corrections:

198 months on Count No. I ☐ concurrent ☐ consecutive
60 months on Count No. II ☐ concurrent ☐ consecutive
 _____ months on Count No. _____ ☐ concurrent ☐ consecutive
 _____ months on Count No. _____ ☐ concurrent ☐ consecutive

Standard range sentence shall be ☒ concurrent ☐ consecutive with the sentence imposed in Cause Nos.: _____.

☒ Credit is given for 135 days served;

4.3 COMMUNITY PLACEMENT AND COMMUNITY CUSTODY RCW 9.94A.120. The defendant is sentenced to community placement for ☒ one year ☒ two years or up to the period of earned early release awarded pursuant to RCW 9.94A.150(1) and (2), whichever is longer.

While on community placement or community custody, the defendant shall: 1) report to and be available for contact with the assigned community corrections officer as directed; 2) work at Department of Corrections-approved education, employment and/or community service; 3) not consume controlled substances except pursuant to lawfully issued prescriptions; 4) not unlawfully possess controlled substances while in community custody; 5) pay supervision fees as determined by the Department of Corrections; 6) residence location and living arrangements are subject to the approval of the department of corrections during the period of community placement.

(a) ☐ The offender shall not consume any alcohol;

(b) ☒ The offender shall have no contact with: Victim on their family

(c) ☐ The offender shall remain ☐ within or ☐ outside of a specified geographical boundary, to-wit: _____

(d) ☐ The offender shall participate in the following crime related treatment or counseling services: _____

(e) ☒ The defendant shall comply with the following crime-related prohibitions: See Appendix F

(f) ☐ OTHER SPECIAL CONDITIONS AND CRIME RELATED PROHIBITIONS: _____

JUDGMENT AND SENTENCE
 FELONY / OVER ONE YEAR - 6

Office of Prosecuting Attorney
 946 County-City Building
 Tacoma, Washington 98402-2171
 Telephone: 591-7400

APPENDIX D

FILED IN
OPEN COURT

MAR 26 1992

R
CD II

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON,

Plaintiff,

vs.

GARY DANIEL MEREDITH,

Defendant.

NO. 92-1-00297-5

WARRANT OF COMMITMENT

MAR 26 1992

- 1) ☒ County Jail
2) ☐ Department of Corrections
3) ☐ Other - Custody

THE STATE OF WASHINGTON TO THE DIRECTOR OF ADULT DETENTION OF PIERCE COUNTY:

WHEREAS, Judgment has been pronounced against the defendant in the Superior Court of the State of Washington for the County of Pierce, that the defendant be punished as specified in the Judgment and Sentence/Order Modifying/Revoking Probation/Community Supervision, a full and correct copy of which is attached hereto.

☒ 1. YOU, THE DIRECTOR, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence. (Sentence of confinement in Pierce County Jail).

☐ 2. YOU, THE DIRECTOR, ARE COMMANDED to take and deliver the defendant to the proper officers of the Department of Corrections; and

YOU, THE PROPER OFFICERS OF THE DEPARTMENT OF CORRECTIONS, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence. (Sentence of confinement in Department of Corrections custody).

WARRANT OF COMMITMENT - 1

Office of Prosecuting Attorney
100 County-City Building
Tacoma, Washington 98402-2171
Telephone: 361-7400

92-1-00297-5

[] 3.

YOU, THE DIRECTOR, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence. (Sentence of confinement or placement not covered by Sections 1 and 2 above).

Dated: 3-26-92

By direction of the Honorable

Ted Rutt
JUDGE
TED RUTT

CLERK

By: Sandy Moon

DEPUTY CLERK

CERTIFIED COPY DELIVERED TO Jail SHERIFF

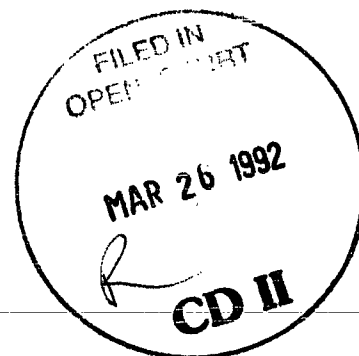
Date 3/26/92 By S. Hyppa Deputy

STATE OF WASHINGTON, County of Pierce
ss: I, Ted Rutt, Clerk of the above
entitled Court, do hereby certify that
this foregoing instrument is a true and
correct copy of the original now on file
in my office.

IN WITNESS WHEREOF, I hereunto set my
hand and the Seal of Said Court this
_____ day of _____, 19____.

TED RUTT, Clerk

By: _____ Deputy



WARRANT OF COMMITMENT - 2

Office of Prosecuting Attorney
946 County-City Building
Tacoma, Washington 98402-2171
Telephone: 591-7400

FILED IN
OPEN COURT

MAR 26 1992

CD II

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON,

Plaintiff,

vs.

GARY DANIEL MEREDITH,

Defendant.

NO. 92-1-00297-5

JUDGMENT AND SENTENCE
(FELONY)

DOB: 06/13/70
SID No.: WA15494138
Local ID No.:

MAR 26 1992

I. HEARING

- 1.1 A sentencing hearing in this case was held on MARCH 26, 1992.
1.2 The defendant, the defendant's lawyer, BRYAN G. HERSHMAN, and the
deputy prosecuting attorney, DENNIS W. ASHMAN, were present.

II. FINDINGS

There being no reason why judgment should not be pronounced, the court
FINDS:

2.1 CURRENT OFFENSES(S): The defendant was found guilty on March 17,
1992 by

☒ plea ☐ jury-verdict ☐ bench trial of:

Count No.: I
Crime: ASSAULT IN THE THIRD DEGREE WITH SEXUAL MOTIVATION
RCW: 9A.36.031(i)(f)
Date of Crime: November 9, 1991
Incident No.: 92-006-0510

- ☐ Additional current offenses are attached in Appendix 2.1.
☐ A special verdict/finding for use of deadly weapon was returned
on Count(s).
☐ A special verdict/finding of sexual motivation was returned on
Count(s).

JUDGMENT AND SENTENCE
(FELONY) - 1

Office of Prosecuting Attorney
446 County-City Building
Tacoma, Washington 98402-3171
Telephone: 509-740-7400

92-1-00297-5

[] A special verdict/finding of a RCW 69.50.401(a) violation in a school bus, public transit vehicle, public park, public transit shelter or within 1000 feet of a school bus route stop or the perimeter of a school grounds (RCW 69.50.435).

[] Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number):

[] Current offenses encompassing the same criminal conduct and counting as one crime in determining the offender score are (RCW 9.94A.400(1)):

2.2 CRIMINAL HISTORY: Prior convictions constituting criminal history for purposes of calculating the offender score are (RCW 9.94A.360):

<u>Crime</u>	<u>Sentencing Date</u>	<u>Adult or Juv. Crime</u>	<u>Date of Crime</u>	<u>Crime Type</u>
RAPE 3°	12/17/91	A	07/19/91	

[] Additional criminal history is attached in Appendix 2.2.

[] Prior convictions served concurrently and counted as one offense in determining the offender score are (RCW 9.94A.360(1)):

2.3 SENTENCING DATA:

	<u>Offender Score</u>	<u>Seriousness Level</u>	<u>Range Months</u>	<u>Maximum Years</u>
Count No. 1:	3	III	9-12	5

[] Additional current offense sentencing data is attached in Appendix 2.3.

2.4 EXCEPTIONAL SENTENCE:

[] Substantial and compelling reasons exist which justify a sentence [] above [] below the standard range for Count(s) _____. Findings of fact and conclusions of law are attached in Appendix 2.4.

JUDGMENT AND SENTENCE
(FELONY) - 2

Office of Prosecuting Attorney
945 County City Building
Tacoma, Washington 98402-2171
Telephone: 509-7400

92-1-00297-5

2.5 RESTITUTION:

☐ Restitution will not be ordered because the felony did not result in injury to any person or damage to or loss of property.
☒ Restitution should be ordered. A hearing is set for LOC.
☒ Extraordinary circumstances exist that make restitution inappropriate. The extraordinary circumstances are set forth in Appendix 2.5.

2.6 ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS: The court has considered the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court specifically finds that the defendant has the ability to pay:

☒ no legal financial obligations.
☒ the following legal financial obligations:
☒ crime victim's compensation fees.
☒ court costs (filing fee, jury demand fee, witness costs, sheriff services fees, etc.)
☐ county or interlocal drug funds.
☐ court appointed attorney's fees and cost of defense.
☐ fines.
☐ other financial obligations assessed as a result of the felony conviction.

A notice of payroll deduction may be issued or other income-withholding action may be taken, without further notice to the offender, if a monthly court-ordered legal financial obligation payment is not paid when due and an amount equal to or greater than the amount payable for one month is owed.

2.7 SPECIAL FINDINGS PURSUANT TO RCW 9.94A.120:

- ☐ The defendant is a first time offender (RCW 9.94A.030(20)) who shall be sentenced under the waiver of the presumptive sentence range pursuant to RCW 9.94A.120(5).
☐ The defendant is a sex offender who is eligible for the special sentencing alternative under RCW 9.94A.120(7)(a). The court has determined, pursuant to RCW 9.94A.120(7)(a)(ii), that the special sex offender sentencing alternative is appropriate.

III. JUDGMENT

3.1 The defendant is GUILTY of the Counts and Charges listed in Paragraph 2.1 and Appendix 2.1.

3.2 ☐ The court DISMISSES.

JUDGMENT AND SENTENCE
(FELONY) - 3

92-1-00297-5

IV. SENTENCE AND ORDER

IT IS ORDERED:

4.1 LEGAL FINANCIAL OBLIGATIONS. Defendant shall pay to the Clerk of this Court:

\$ _____, Restitution to: _____
\$ 78.00, Court costs (filing fee, jury demand fee, witness costs, sheriff service fees, etc.);
\$ 100.00, Victim assessment;
\$ 350.00, Fine; [] VUCSA additional fine waived due to indigency (RCW 69.50.430);
\$ _____, Fees for court appointed attorney;
\$ _____, Drug enforcement fund of _____;
\$ _____, Other costs for: _____;
\$ 528.00, TOTAL legal financial obligations [] including restitution [] not including restitution.

Payments shall not be less than \$ 40.00 per month. Payments shall commence on 60 DAYS FROM RELEASE
[] Restitution ordered above shall be paid jointly and severally with: _____
Cause Number _____
Name _____

The defendant shall remain under the court's jurisdiction and the supervision of the Department of Corrections for a period up to ten years from the date of sentence or release from confinement to assure payment of the above monetary obligations.

Any period of supervision shall be tolled during any period of time the offender is in confinement for any reason.

Defendant must contact the Department of Corrections at 755 Tacoma Avenue South, Tacoma upon release or by _____.

☒ Bond is hereby exonerated.

JUDGMENT AND SENTENCE
(FELONY) - 4

Office of Prosecuting Attorney
945 County City Building
Tacoma, Washington 98402-2171
Telephone: 591-7400

92-1-00297-5

4.2 CONFINEMENT ONE YEAR OR LESS: The court imposes the following sentence:

(a) TOTAL CONFINEMENT: Defendant is sentenced to following term of total confinement in the County Jail commencing IMMEDIATELY.

12 MONTHS days on Count No. 1 ☐ concurrent ☐ consecutive
days on Count No. ☐ concurrent ☐ consecutive
days on Count No. ☐ concurrent ☐ consecutive

☐ Actual number of days of total confinement ordered is:
☒ This sentence shall be ☒ concurrent ☐ consecutive with the sentence in 91-1-02619-1

☒ Credit is given for 100 days served.
☐ Confinement shall be intermittent as follows:

(b) ALTERNATIVE CONVERSION PURSUANT TO RCW 9A.94A.380:

days of actual total confinement imposed above shall be converted to:

 days of partial confinement.
☐ Partial confinement shall be served in work release.
☐ Partial confinement shall be served in home detention.

☐ hours of community service under the supervision of the Department of Corrections to be completed within months of ☐ this date ☐ release from confinement.

☐ Alternative conversion was not used because:

(c) ☐ COMMUNITY SUPERVISION: Defendant shall serve months in community supervision under the Department of Corrections. Defendant must contact the Department of Corrections at 755 Tacoma Avenue South, Tacoma upon release or by . Defendant shall comply with all rules, regulations and requirements of the Department. The defendant's monthly probationer assessment to the Department is as follows (RCW 9.94A.270):

☐ Full payment ☐ Total exemption
☐ Partial exemption as follows:

(d) ☐ CRIME RELATED PROHIBITIONS AND OTHER REQUIREMENTS: Crime related prohibitions and other requirements are attached.

SENTENCE ONE YEAR OR LESS - 1

Office of Prosecuting Attorney
140 County-City Building
Tacoma, Washington 98402-2171
Telephone 509-780-7000

92-1-00297-5

(e) [] HIV TESTING. The Health Department or designee shall test the defendant for HIV as soon as possible and the defendant shall fully cooperate in the testing.

(f) [] DNA TESTING. The defendant shall have a blood sample drawn for purpose of DNA identification analysis. The county shall be responsible for obtaining the sample prior to the defendant's release from confinement.

EACH VIOLATION OF THIS JUDGMENT AND SENTENCE IS PUNISHABLE BY UP TO 60 DAYS OF CONFINEMENT. (RCW 9A.44.200(2)). ANY DEFENDANT CONVICTED OF A SEX OFFENSE MUST REGISTER WITH THE COUNTY SHERIFF FOR THE COUNTY OF THE DEFENDANT'S RESIDENCE WITHIN 30 DAYS OF DEFENDANT'S RELEASE FROM CUSTODY. RCW 9A.44.130.

PURSUANT TO RCW 10.73.090 AND 10.73.100, THE DEFENDANT'S RIGHT TO FILE ANY KIND OF POST SENTENCE CHALLENGE TO THE CONVICTION OR THE SENTENCE MAY BE LIMITED TO ONE YEAR.

Date: 3-26-92

Presented by:

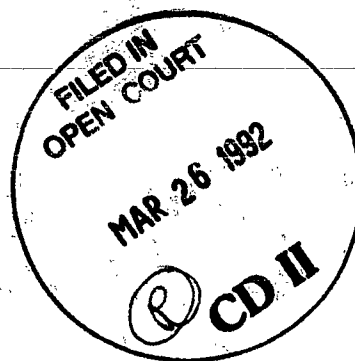
Dennis W. Ashman
Deputy Prosecuting Attorney
WSB # 11299

Brian Tolleson
JUDGE

Approved as to form:

[Signature]
Lawyer for Defendant
WSB # 14990

bjb



SENTENCE ONE YEAR OR LESS - 2

Office of Prosecuting Attorney
900 County City Building
Tacoma, Washington 98402-2171
Telephone: 571-7400

FINGERPRINTS

Right Hand

Fingerprint(s) of: GARY DANIEL MEREDITH, Cause #92-1-00297-5

Attested by: Ted Rutt TED RUTT
COUNTY CLERK CLERK

By: DEPUTY CLERK Janie Robertson JANIE ROBERTSON Date: 3/26/92
Deputy Clerk

CERTIFICATE

I, _____
Clerk of this Court, certify that
the above is a true copy of the
Judgment and Sentence in this
action on record in my office.

Dated: _____

CLERK

By: _____
DEPUTY CLERK

OFFENDER IDENTIFICATION

State I.D. # WA15494138

Date of Birth 06/13/70

Sex MALE

Race WHITE

ORI _____

OCA _____

OIN _____

DOA _____

FINGERPRINTS

Office of Prosecuting Attorney
945 County City Building
Tacoma, Washington 98402-2171
Telephone: 561-7000

APPENDIX E

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON

Plaintiff,

v.

MATTHEW F. BOLAR

Defendant.

No. 94-1-07791-7

JUDGMENT AND SENTENCE

ON RESENTENCING

55 AUG 13 AM 9:34

KING COUNTY
SUPERIOR COURT CLERK
SEATTLE, WA.

55 AUG 13 AM 9:34

KING COUNTY
SUPERIOR COURT CLERK
SEATTLE, WA.

COMMITMENT ISSUED AUG 13 1996

COPY TO SENTENCING GUIDELINES COMMISSION AUG 13 1996

PRESENTING STATEMENT & INFORMATION ATTACHED

I. HEARING

SUZANNE LEE ELLIOTT

- 1.1 The defendant, the defendant's lawyer, BURNS PETERSON, and the deputy prosecuting attorney were present at the sentencing hearing conducted today. Others present were: _____

- 1.2 The state has moved for dismissal of count(s) Resentencing ordered by Supreme Court on mandate 7-1-96;

II. FINDINGS

Based on the testimony heard, statements by defendant and/or victims, argument of counsel, the presentence report(s) and case record to date, and there being no reason why judgment should not be pronounced, the court finds:

JUDGMENT NUMBER 2 CURRENT OFFENSE(S): The defendant was found guilty on (date): 01-04-95 by plea of:

Count No.: I Crime: RESIDENTIAL BURGLARY
RCW 9A.52.025 Crime Code 02310
Date of Crime 11-23-94 Incident No. _____

Count No.: _____ Crime: _____
RCW _____ Crime Code _____
Date of Crime _____ Incident No. _____

Count No.: _____ Crime: _____
RCW _____ Crime Code _____
Date of Crime _____ Incident No. _____

☐ Additional current offenses are attached in Appendix A.

SPECIAL VERDICT/FINDING(S):

- (a) ☒ A special verdict/finding for being armed with a Firearm was rendered on Count(s): _____
(b) ☐ A special verdict/finding for being armed with a Deadly Weapon other than a Firearm was rendered on Count(s): _____
(c) ☐ A special verdict/finding was rendered that the defendant committed the crimes(s) with a sexual motivation in Count(s): _____
(d) ☒ A special verdict/finding was rendered for Violation of the Uniform Controlled Substances Act offense taking place ☐ in a school zone ☐ in a school ☐ on a school bus ☐ in a school bus route stop zone ☐ in a public park ☐ in public transit vehicle ☐ in a public transit stop shelter in Count(s): _____
(e) ☐ Vehicular Homicide ☐ Violent Offense (D.W.I. and/or reckless) or ☐ Nonviolent (disregard safety of others)
(f) ☐ Current offenses encompassing the same criminal conduct and counting as one crime in determining the offender score (RCW 9A.400(1)(a)) are: _____

- 2.2 OTHER CURRENT CONVICTION(S): Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number): _____

62

2.3 CRIMINAL HISTORY: Prior convictions constituting criminal history for purposes of calculating the offender score are (RCW 9.94A.360):

Crime	Sentencing Date	Adult or Juv. Crime	Cause Number	Location
(a) ROBBERY 1	07-19-84	ADULT	841012273	KING COUNTY
(b) VUCSA	04-28-88	ADULT	871047420	KING COUNTY
(c) VUCSA	04-28-88	ADULT	871047420	KING COUNTY
(d) VUCSA	04-28-88	ADULT	871047420	KING COUNTY

☒ Additional criminal history is attached in Appendix B.

☒ Prior convictions (offenses committed before July 1, 1986) served concurrently and counted as one offense in determining the offender score are (RCW 9.94A.360(6)(c)): b, c, d, e

☐ One point added for offense(s) committed while under community placement for count(s) _____

2.4 SENTENCING DATA:

SENTENCING DATA	OFFENDER SCORE	SERIOUSNESS LEVEL	STANDARD RANGE	ENHANCEMENT	TOTAL STANDARD RANGE	MAXIMUM TERM
Count 1	<u>63</u>	IV			<u>33 TO 43 MONTHS</u>	10 YRS AND/OR \$20,000
Count					<u>15 to 22</u>	
Count					<u>13 to 17</u>	

Additional current offense sentencing data is attached in Appendix C.

2.5 EXCEPTIONAL SENTENCE:

☐ Substantial and compelling reasons exist which justify a sentence above/below the standard range for Count(s) _____. Findings of Fact and Conclusions of Law are attached in Appendix D. The State ☐ did ☐ did not recommend a similar sentence.

III. JUDGMENT

IT IS ADJUDGED that defendant is guilty of the current offenses set forth in Section 2.1 above and Appendix A.

☐ The Court DISMISSES Count(s) _____

IV. ORDER

IT IS ORDERED that the defendant serve the determinate sentence and abide by the other terms set forth below.

4.1 RESTITUTION AND VICTIM ASSESSMENT:

☐ Defendant shall pay restitution to the Clerk of this Court as set forth in attached Appendix E.
☐ Defendant shall not pay restitution because the Court finds that extraordinary circumstances exist, and the court, pursuant to RCW 9.94A.142(2), sets forth those circumstances in attached Appendix E.
☐ Restitution to be determined at future hearing on (Date) _____ at _____ m. ☐ Date to be set.
☐ Defendant waives presence at future restitution hearing(s).
 Defendant shall pay Victim Penalty Assessments pursuant to RCW 7.68.035 in the amount of \$100 if all crime(s) date prior to 6-6-96 and \$500 if any crime date in the judgment is after 6-5-96.

4.2 OTHER FINANCIAL OBLIGATIONS: Having considered the defendant's present and likely future financial resources, the Court concludes that the defendant has the present or likely future ability to pay the financial obligations imposed. The Court waives financial obligation(s) that are checked below because the defendant lacks the present and future ability to pay them. Defendant shall pay the following to the Clerk of this Court:

- (a) ☐ \$ _____, Court costs; ☒ Court costs are waived;
 (b) ☒ \$ 342, Recoupment for attorney's fees to King County Public Defense Programs, 2015 Smith Tower, Seattle, WA 98104; ☐ Recoupment is waived (RCW 10.01.160);
 (c) ☐ \$ _____, Fine; ☐ \$1,000, Fine for VUCSA; ☐ \$2,000, Fine for subsequent VUCSA; ☐ VUCSA fine waived (RCW 69.50.430);
 (d) ☐ \$ _____, King County Interlocal Drug Fund; ☐ Drug Fund payment is waived;
 (e) ☐ \$ _____, State Crime Laboratory Fee; ☐ Laboratory fee waived (RCW 43.43.690);
 (f) ☐ \$ _____, Incarceration costs; ☐ Incarceration costs waived (9.94A.145(2));
 (g) ☐ \$ _____, Other cost for: _____

4.3 PAYMENT SCHEDULE: Defendant's TOTAL FINANCIAL OBLIGATION is: \$ 442.⁰⁰. The payments shall be made to the King County Superior Court Clerk according to the rules of the Clerk and the following terms:
☐ Not less than \$ _____ per month; ☒ On a schedule established by the defendant's Community Corrections Officer. ☐ _____ The Defendant shall remain under the Court's jurisdiction and the supervision of the Department of Corrections for up to ten years from date of sentence or release from confinement to assure payment of financial obligations.

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON

Plaintiff,

v.

MATTHEW F. BOLAR

Defendant.

No. 94-1-07791-7

APPENDIX B
JUDGMENT AND SENTENCE -
(FELONY) - ADDITIONAL CRIMINAL HISTORY


2.3 The defendant has the following additional criminal history used in calculating the offender score (RCW 9.94A.360):

Crime	Sentencing Date	Adult or Juv. Crime	Cause Number	Location
(e) BAIL JUMPING	04-28-88	ADULT	871047420	KING COUNTY
(f) VUCSA	11-09-89	ADULT	891021257	KING COUNTY

☐ The following prior convictions were counted as one offense in determining the offender score (RCW 9.94A.360(II)):

Date:

8 Aug 96


JUDGE, King County Superior Court

APPENDIX B

DECLARATION OF SERVICE BY MAIL

GR 3.1

I, Gary Meredith, declare and say:

That on the 27 day of January, 2015, I deposited the following documents in the Stafford Creek Correction Center Legal Mail system, by First Class Mail pre-paid postage, under cause No. 46671-6-II:

Brief in Support of PERSONAL RESTRAINT PETITION

addressed to the following:

COURT OF APPEALS, DIV. 2
950 BROADWAY STE 300
TACOMA, WA 98402-3694

FILED
COURT OF APPEALS
DIVISION II
2015 JAN 29 PM 1:12
STATE OF WASHINGTON
BY DEPUTY

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED THIS 27 day of January, 2015, in the City of
Aberdeen, County of Grays Harbor, State of Washington.

Gary Meredith
Signature

Gary Meredith
Print Name

DOC# 984777 UNIT# H4 B38
STAFFORD CREEK CORRECTIONS CENTER
191 CONSTANTINE WAY
ABERDEEN WA 98520